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THOUGHTS, ANALYSIS PERSPECTIVES AND CRITICS OF FUNCTION OF PUNISHMENT IN INTERNATIONAL CRIMINAL LAW

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Abstract: International criminal law constitutes, due to its intrinsic characteristics, a competition challenge at the universal level of norms and crimes which finds its most natural and logical manifestation through the final penalties provided for in the Statute of the International Criminal Court (StICC). The present work has as its object to analyze the punishment according to the StICC, the hypotheses of normative convergences that are established alongside the foreseen sentences, the jurisprudential cases, the verifiable convergences within the global international community where the sentences take place over the years, the path of harmonization, integration, evolution, development not so much of international criminal law but also of domestic law, the rationalization of accounts with internal justice which is never eliminated by the international one, snubbed towards a type of annihilating *a priori* inevitable phenomena against the impunity, the

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continuous violence against human rights and the strength of the victors and hegemons.

Key words: ICC, ICTY, ICTR, crimes against humanity, international criminal justice, function of punishment, StICC, principle of complementarity, core crimes, restorative penalty, transitional justice, consequentalism.

Introduction

It has been an affirmative and indisputable reality for many years now that international criminal law has therefore performed a function of protection and prevention from offenses to the fundamental collective and universal legal goods attributable to international humanity as such (May, 2005)[2]. The collective, individual element of international criminal justice has been attempted to unblock and complicate the classic model of attributing a fact to the perpetrator of the crime, to the perpetrator of an international crime, given that it introduces a further and high level of imputation arriving at concrete penalties which have as their object the interaction of individual conduct, i.e. individual responsibility.

[2]The author resorts to the principle of offensiveness in order to delimit the area of intervention of the criminal instrument, proposing the following formulation: serious harm to the international community occurs whenever victims become targets of criminal conduct because belonging to a particular group and not because of some individual characteristics, or in all cases where crimes are committed by a state or another collective entity (group-based harm approach).

The penalty now presents itself as a precise, fundamental, systemic, collective, massive source of international criminal law (Marchuk, 2014). In international criminal law, therefore, the double level of potential overlaps and interferences through the principle of complementarity and not only gives the matter of penalties a degree of greater complexity and simplicity (Kolb, Scalia, 2012; Reed, Bohlander, 2014; Peay, 2015)[3]. But how? One wonders whether, faced with this peculiar manifestation of the convergence of concrete penalties, the international judges have followed the path and the classic criteria of national criminal law such as the solution of the question-specialty, consumption and subsidiarity-directly applicable in the StICC in the international context or if, on the contrary, it is appropriate to devise new paths by amending this statute in the coming years (Erdei, 2001; Kelt, Von Hebel, 2001).

The need for punishment is the meritorious result (Langer, 1972; Schmidhäuser, 1984; Wolter, 1996; Rönau, Kohn, Zieschang, 2011; Srtratenwerth, Kuhlen, 2011; Freund, 2013; Klesczewski, 2016; Roxin, Schünemann, 2017) of same reasons for punishing

[3]Other authors still prefer to remain anchored to the quadripartite structure of crime and composed of the actus reus ("l'ensemble des éléments descriptifs qui caractérisent l'action ou l'omission prohibées"), from mens rea ("l'élément mental ou intérieur au perpétrateur"), from the reasons for the exclusion of criminal responsibility and the objective conditions for the persecution of the crime (ne bis in idem, age of the defendant, immunity and extinction prescription). According to our opinion, this last approach can not be accepted because it confuses the constitutive elements of the crime with factors external to the typical fact, such as the causes of exclusion of the penalty (immunity), or that intervene after the crime is already perfect, as the causes of extinction of the crime (prescription).

that are configured as elements proper to the crime (Bloy, 1976; Otto, 1978; Günther, 1983; Kunz, 1984; Volk, 1985; Jescheck, Weigend, 1996; Kemph, Lüderssen, Volk, 2013; Schmitt-Leonardy, 2013; Sinn, 2013; Pfaffinger, 2015; Bott, 2016; Wessels, Beulke, 2016; Hallmann, 2017; Griego, 2018). This is a testimony that introduces the basis of legitimation into a circuit of a configuration of the mechanisms of punishment within current thoughts that identify the casuistry of hypotheses of non-punishability, as in the past. The penalty now applies to unlawful and guilty acts, in additional conditions, created in a space of choices on the political-legislative level that affects the existence of the crime and the related conduct that surrounds it.

As observed by Theodor Rittler (Rittler, 1930):

> "(...) the opposition between crime and punishability indeed emerged clearly in the thought of Karl Binding, thanks to the distinction between *Norm* and *Strafgesetz.* (…) Once this conception has been overcome and criminal law has been recognized as having a link with typicality, the demarcation line between *Tatbestand* and conditions (in the broad sense) of punishability will have to be identified; a delimitation, moreover, which is now entrusted to the regulatory system (criminal), cannot fail to prove more difficult and impervious (…)" (Jacobs, 2011).

Beling, while considering it indispensable, did not fail to recognize the logic that should be considered satisfied, even if a threat of punishment was not always specifically identifiable. The *Tatbestand* of the crime, for example, would have been recognizable even in the case of an attempt of contravention, or in that of culpable damage, even if such conducts do not come to form the object of a "threat of punishment". The *Tatbestand* and

the conduct conforming to it seem to express, in the thought of the author, a "power to be" not always, necessarily, integrated and "completed" with the "legal" sanction that such a threat comes to predispose. And from this point of view, it can therefore be assumed that the "particular conditions" of the threat (of which we are precisely discussing) came to denote, rather than an element of the crime, however distinct from the *Tatbestand,* the fruit and the precipitate of that "sovereign" prerogative in which the "positivization" of the *jus puniendi* embodied by the provision of the sanction (Jacobs, 2011).

Punishment in international criminal justice is not a threat destined to revolve around its own defined object or subtracted from discretionary, arbitrary evaluations. Punishment is fundamental to a functioning system of hybrid, international, *super partes* justice. The political-criminal choices are surpassed in front of individual, international responsibility arriving at the functioning and purposes of the penalty as the first "ends" of international criminal justice[4].

[4]See ex multis: Prosecutor v. Kambanda, ICTR 97-23-S, judgment and sentence, 4 September 1998, paras 44 & 61-62. This sentence was upheld on appeal. See Kambanda v. Prosecutor, ICTR-97-23-A, appeals judgment 19 October 2000, para 126. Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, ICTR-99-52-A, appeals judgment 28 November 2007, para 1038(3). (The existence of mitigating circumstances does not automatically preclude the imposition of life imprisonment.) Prosecutor v Ndindabahizi, ICTR-2001-71-I, judgment and sentence 15 July 2004, para 498. Ndindabahizi v. Prosecutor, ICTR-01-71-A, appeals judgment 16 January 2007, paras 124-142; Prosecutor v. Ngiyitegeka, ICTR-96-14-A, appeals judgment, 9 July 2004, para 267; Ngiyitegeka, appellant's brief, 23 December 2003, para 215. Prosecutor v. Serugendo, ICTR-2005-84-I, judgment and sentence, 12 June 2006, paras 57 & 89. Prosecutor v. Nchamihigo, ICTR-01-63-T, judgment and

The function of the penalty cannot be separated from the *ratio puniendi* itself and the question is: What conditions will be given for the autonomy of the punishability with respect to other qualification profiles of the offending fact?

First of all we can say that the *Zweckgedanke* profile proposed to the category of punishability would concern balances of "additional" interests (Jacobs, 2011) which respect the founding profile of the offense which is inspired by the typicality of the penalty and assumes an exclusively "precodifying" character, *rectius* codification through the StICC and as such no longer likely to be further re-discussed. The problematic criterion of the essential requirement called to play the role of discrimination with respect to a phenomenon of non-punishability has now passed into history from the Nuremberg period. Secondly according to Höpfel and Ratz:

"(…) A category, in effect, should be considered the expression of a norm with a "negative" sanction, on which it may possibly intervene- "requalifying" the offense (as a whole) that this offense involves-a norm with a "positive" sanction which decrees the effect of non-punishability (…)" (Höpfel, Ratz, 2011).

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sentence, 12 November 2008, para 388; Prosecutor v. Muvunyi, ICTR-00-55A-T, judgment and sentence, 12 September 2006, para 538; Prosecutor v. Seromba, ICTR-2001-66-I, judgment 13 December 2006, para 403; Prosecutor v. Ntagerura, ICTR-99-46-T, appeals judgment 25 February 2004, para 815; Ngiyitegeka v. Prosecutor, ICTR-96-14-T, judgment and sentence 16 May 2003, para 486; Prosecutor v. Muhimana, ICTR- 95-1B-T, judgment and sentence 28 April 2005, paras 604-616; Prosecutor v. Kamuhanda, ICTR-99-54A-T, judgment and sentence, 22 January 2004, paras 6, 764 & 770; Ndindabahizi (n 37 above) paras 505, 508 & 511; Karera v. Prosecutor, ICTR-01-74-T, judgment and sentence 7 December 2007, para 583; Prosecutor v. Musema, ICTR-96-13-T, judgment and sentence 27 January 2000, paras 999-1008.

This approach undoubtedly proves to be suitable for overcoming-thanks to the reference to the nature (still) of "criminal" norms of the causes of non-punishability themselves-the antiquated idea of the indissolubility between precept and sanction. However, it seems to still leave open the questions that the example mentioned above (or others, which we leave aside for the moment) seem destined to raise. And in fact, as indeed the systematic scenario that it outlines suggests, could not do without research aimed at probing the usability of further- and much more varied-hermeneutic criteria. Criteria, however, which, offering (think of the reference to the regime and the relevant consequences from a procedural point of view) mostly of the "indications" not always endowed with a univocal meaning (Höpfel, Ratz, 2011).

Finally, what are the penalties provided for by the StICC? In short, we can say that art. 23 was one of the novelties of the StICC in relation to the penalty system since it regulated, identified the sanction system including the fine and confiscation (art. 77 StICC and 145 Rules of Procedure and Evidence) (Ambos, 2022a)[5] and, determined the specific penalty

[5]Prosecutor v. Lubanga, ICC T. Ch. I, Judgment, ICC-01/04-01/06, 14 March 2012, para. 542Prosecutor v. Radislav Krstić (Case No. IT-98-33-A), ICTY A. Ch., Judgment, 19 April 2004 article 24(1) of the ICTY Statute and Article 23(1) of the ICTR Statute provide only that: "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment (...) while article 19 of the SCSL Statute and article 24 of the STL Statute provide that imprisonment shall be "for a specified number of years" (…) fixed-term sentences imposed by the ICTY range from 6 years' imprisonment, imposed on Dražen Erdemović (IT-96-22-A, Judgment, 7 October 1997), to 40 years' imprisonment, imposed on Milomir Stakić (IT-97-24-A, Judgment, 22 March 2006)

(articles 103-111 StICC, Rule 145). On the one hand, the prison sentence is foreseen, that is life imprisonment, imprisonment of up to 30 years, and penalty (Gumboh, 2011; Cuorovic, Filipovic, 2021). Nothing changes with regard to the attempt (Kress, 1998). Thus an edict framework of the same nature is established which leaves the judge the possibility of expressing the severity of the punishable conduct according to the severity, i.e. Rule 146 which governs whether the Judge can make use of the fine together with the prison sentence according to daily rates (par 4). The confiscation is established according to Rule 147 and also according to art. 78 StICC (Kurth, 2013; Ambos, 2022a)[6] which establishes the sentence that can be imposed, the

and Goran Jelisić (IT-95-10-A, Judgment, 5 July 2001) (...)". Sentences handed down by the ICTR range from 6 years' imprisonment imposed on Michel Bagaragaza (ICTR-05-86, Judgment, 17 November 2009), to 45 years' imprisonment imposed on Juvenal Kajelijeli (ICTR-98-44A, Judgment, 23 May 2005); (Prosecutor v. Kajelijeli (Case No. ICTR-98-44A), ICTR A. Ch., Judgment, 23 May 2005, para. 325).

[6]ICTY, Prosecutor v. Mucić et al. (Case No. IT-96-21-A), ICTY A. Ch., Appeals Judgment, 20 February 2001, para. 429); Prosecutor v. M. Bralo (Case No. IT-95-17), ICTY T. Ch., Trial Judgment, 7 December 2005, para. 27; Prosecutor v. Brđanin (Case No. IT-99-36), ICTY T. Ch., Trial Judgment, 1 September 2004, para. 1096; Prosecutor v. Kunarac, Kovač and Vuković (Case No. IT-96-23&23/1), ICTY T. Ch., Trial Judgment, 22 February 2001, para. 847). As regards mitigating factors on the other hand, the ICTY has established that the burden of proof is on the balance of probabilities (Prosecutor v. Blaškić, (Case No. IT-95-14), ICTY A. Ch., Appeals Judgment, 29 July 2004, para. 697; Prosecutor v. Blagojević and Jokić (Case No. IT-02-60) ICTY T. Ch., Trial Judgment, 17 January 2005, para. 850; Prosecutor v. Babić (Case No. IT-03-72), ICTY A. Ch., Appeals Judgment, 18 July 2005, para. 43). (Prosecutor v. Lubanga, ICC T. Ch., Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012): "(…) The prosecution's failure to charge Thomas Lubanga Dyilo with rape and other forms of sexual violence as separate crimes within the jurisdiction of the Court is not determinative of the question of whether that activity is a relevant factor in the determination of the sentence. The Chamber is entitled to consider sexual violence under Rule 145(1)(c) of the Rules as part of: (i) the harm suffered by the victims; (ii) the nature of the unlawful behaviour; and (iii) the circumstances of manner in which the crime was

judicial commensuration of the assessment of the seriousness of the crime and the personal situation of the convict thus allowing a type of concrete identification of the sentence (Kuniewicz, 2015; Chaitidou, 2021)[7]. As regards the contribution to the crime, the Judge can establish among the criteria indicated the extent of the intention and of the damage caused to the victims (Olàsolo, Kiss, 2010). That is according to a restrictive

committed; additionally, this can be considered under Rule 145(2)(b)(iv) as showing the crime was committed with particular cruelty (…)". (Prosecutor v. Katanga, ICC T. Ch., Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3484, 23 May, 2014, para. 35): "(…) [e]lle considère que la peine a donc deux fonctions importantes: le châtiment d'une part, c'est-à-dire l'expression de la réprobation sociale qui entoure l'acte criminel et son auteur et qui est aussi une manière de reconnaitre le préjudice et les souffrances causées aux victimes; la dissuasion d'autre part, dont l'objectif est de détourner de leur projet d'éventuels candidats à la perpétration de crimes similaires (…)". In the same spirit: the ICTY in Prosecutor v. Blagojević and Jokić (Case No. IT-02-60), ICTY T. Ch., Trial Judgment, 7 January 2005, paras. 858-860) and Prosecutor v. Plavšić (Case No. IT-00-39&40/1), ICTY T. Ch., Sentencing Judgment, 27 February 2003, paras. 85-94 and 110), the Trial Chamber noted that: "(...) efforts to promote peace and reconciliation should be taken into consideration in determining the sentence. While the Trial Chamber did not conclude that it had been proven on the balance of probabilities that Katanga had made efforts to actively encourage the peace process, evidence did demonstrate that he played a positive role in the disarmament and demobilisation of child soldiers, which was given more weight than his young age and personal circumstances (…)". Nahimana et al (Case No. ICTR-99-52), ICTR T. Ch., Trial Judgment, 3 December 2003) and Kajelijeli (Case No. ICTR-98-44-A), ICTR A. Ch., Appeals Judgment, 23 May 2005) in stating that: "(...) the violation of fundamental human rights during detention could be considered as mitigating factors (…) The Trial Chamber however found that it could only Judge on Katanga's detention further to an order of the Court and thus could not pass judgment on his detention in the Democratic Republic of the Congo ("DRC") (…)".

[7]ICC, The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), ICC-02/05-01/20; The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud; ICC-01/12-01/18; The Prosecutor v. Paul Gicheru ICC-01/09-01/20; The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka ICC-01/14-01/22; The Prosecutor v. Bosco Ntaganda ICC-01/04-02/06; The Prosecutor v. Dominic Ongwen ICC-02/04-01/15; The Prosecutor v. Mahamat Said Abdel Kani ICC-01/14-01/21; The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona ICC-01/14-01/18.

interpretation based on the principle of *nemo tenetur se detegere* expressed by Rule 145, paragraph 2, lett. b) the judge according to the aggravating circumstances that can be assessed, determined the final sentence (Van der Vyver, 2018)[8].

At the appeal stage, cannot according to art. 83 decide *in peius,* if the appeal is proposed by the Prosecutor or the defender, always in the interest of the convicted (art. 83, paragraph 2) (Ambos, 2022a). Within this circle we also mean the request for review in the event that new decisive evidence emerges for the outcome of the trial which demonstrates the guilt and/or innocence of the accused (art. 84 StICC and Rules of Procedure and Evidence: 159, 160, 161) (Ambos, 2022a).

To bring order to this complex and delicate matter, it seems necessary that the phenomenon of punishment has as its final objective not only that of punishing, but also of protecting human rights, and all those elements that enter the sphere, in the perspective that they occupy and verify the "thickness" of the offence, inherent in the teleologism of the penalty within the framework of an observation of a small fact for the evolution of international criminal justice.

[8]"(…) one should namely distinguish between (a) the essence of punishment (retribution); (b) the functions of punishment (incapacitation, rehabilitation, deterrence, and avoiding impunity); (c) factors inherent in or resulting from a particular offence and which may be taken into account in determining an appropriate sentence (sentencing factors of the offence); and (d) circumstances attending the commission of an offence that have a bearing on an appropriate sentence in any given case but are in themselves not constituent elements of the criminal act as such (extenuating and aggravating circumstances) (…)".

Jus gentium, juridical space and function of punishment

The shadows of the past and the light in the sanction system established by international criminal justice pay attention due to the important and substantial evolution of modern international criminal law. A disciplinary area that is based on balance, approaches, conceptions, internationalist logics, state prerogatives, and continuous debates for a certain jurisprudence even in its infancy which makes us reflect both on the system and on the function of the penalty in international criminal law.

First of all, the problem of prescription remains one of the problems of punishment in international criminal law (Ambos, 2013; Ohlin, 2013; Fry, 2014; Triffterer, 2016) in relation to the purposes it should perform in international courts and as a recognition of the meaning of criminal coercion in the *jus gentium*.

This is a debate with a certain skepticism that has been going on since the beginning of the establishment of international tribunals. It was open in relation to the possibility of real concretization of a global system avoiding a descriptive perspective, i.e. an indelible justice towards utopia. We are talking about a justice that respects and protects human rights by seeking to prosecute barbarism and needing a global system that ignores the limits of territorial sovereignty and responds to the

perpetration of atrocities against humanity in a meta-historical dimension where moral value goes beyond the boundaries of individual legal systems legitimizing the aspirations of penal intervention (Berlin, 2020).

Since its inception, the StICC has not offered unambiguous indications on the purpose assigned to the criminal sanction. The remaining recurring temptation was to reconstruct a penalty in the international arena of a traditional type, designed for penal intervention subject to the state monopoly of coercion which it already pays for from the outset due to the lack of the postulates which remain at the foundation of the latter (Werle, 1997; Keller, 2002; Manske, 2003; Basak, 2005; Dörr, 2005)[9].

The function of the penal of national inspiration had the consequence of including the nature of macro-crimes and the related cases envisaged. The retribution of atrocities had long-term consequences on future generations who needed an adequate response and above all the commuting of the proportional sentence. The aim was prevention in the context of time, place and situation in which it occurred. Models that do not leave enough reasons to justify the costs of the system. Prevention with respect to a system that is not based on a defined territory and does not know the vision of powers and is independent of a link between punitive intervention and state

[9]ICTY, Prosecutor v. Kupreškić, Trial Chamber, Judgment, 8 January, 1999.

sovereignty. Thus, a monopoly of coercion of the penal instrument is renounced by recognizing the national jurisdictions based on the principle of complementarity (Mayans Hermida, Holà, 2020).

An administration of justice that is independent of a police apparatus and enforces its decisions by relying on the active cooperation between States (Liakopoulos, 2019a) and those who voluntarily prepare it and who are not members of a statute of an international court. States released from temporal and spatial limits where they speak of a preventive function as an objective proclaimed by the StICC itself with reference to the settlement of armed conflicts, as a facet of prevention that integrates and rebuilds a connective tissue of society through the compensation of its deviant elements. We talk about the prevention of international crime, a perspective that moves towards a strong pedagogical message of global inculturation. The domestic analogy allows us to re-read the traditional categories on the subject of the function of punishment in the national, state and international sphere (Riccardi, 2016) which reveals the fragility in the face of the fundamental problem of a system that was formed on an abstract model of universal justice-in this case in an ethical sense-in the experience of inter-ethnic conflicts that we have experienced for years at a global level (Gierhake, 2008).

The StICC has been working towards a cooperation of justice to peace (Gegout, 2013). It looks like a naive slogan but at the same time considered the construction of one of the greatest utopias realized for more than two millennia. Within this circle, perplexities and anxieties regarding the function of the penalty in international tribunals recur to the subject of the jurisdiction of the ICC (Beserdorf, 2002; Tsilonis, 2019) arranging decisive historical-geographical situations. It is no longer a transitional jurisdiction such as that envisaged in the ad hoc courts. Nor of a first approximation for a situational and emergency jurisdiction due to the topics and crimes that had to be addressed with the birth of the ICC. The ICC assumes the task of protecting human rights globally and not in a specific emergency situation but in a specific infinite temporal context given that the tendentially universal vocation of this court does not reflect on the purposes assigned to this model of international penal coercion (Werle, Jessberger, 2020).

It is true that we speak of vocation but in reality we have jurisdictional rules that cannot be traced back to that model and that of complementarity. And within this framework we must also take into consideration the lack of telluricity of international humanitarian law, i.e. the *iustissima tellus* of the link between localization and law without usually considering an existing legal order. Therefore we speak of deterritorialization, in our

opinion of deconstruction of the relationship between localization and coercive power. Criminal law shifts and redraws various points of reference. The monopoly of coercion is superimposed on emerging levels of the new jurisdictional form due to the functioning principle of complementarity. Criminal-type intervention does not have a center based in all the Member States but a dislocation of the criminal justice apparatus. People, territory, sovereignty can be considered as victims of the rupture of the Westphalian model and the nation state assumes an individual nature becoming a closed system with borders drawn by political geography with exclusive prerogatives connected to sovereignty where the monopoly of the law becomes the application of legitimate physical violence reducing thus its centrality (Ba, 2020).

The demarcation of the internal-external dimension of the sovereign State as limiting term that has lasted for centuries represents an undisputed postulate in international law. Organizational function of the relations between State and citizen viewed in order to guarantee the mutual conditions of freedom and peaceful coexistence, the integration of a normative stability which governs the relations between States, as power policies of the time. The inside-outside nature that had been seen as typical element of the form of the modern State of post-Westphalian history disappears and the synallagmatic logic of a

Hobbesian nature assumes a monopoly of powers capable of safeguarding the internal peace that regulates relations with other sovereign States in the European space based on natural, non-discriminatory or criminalized state. Criminalized because the belligerent powers respect as *justi hostes* the political entities that wage war on the same level mutually recognizing the actions of the extra-European space without laws, a space open to hegemonic or imperialist expansions or simply through acts of piracy, i.e. "lovable" topics in the history of public international law.

It was globalization that produced a world State of "Leviathan" nature, an impossible undertaking given that the absence of borders between an inside and an outside is incompatible with the monopolistic and exclusive nature of the State which represents a model of multilevel governance system posthobbesian in nature and not a Kelsenian-inspired *civitas maxima*; where sovereign entities are multiple and political forms spread globally and multilaterally. A multiversalism where powers compose a dynamic balance. The *topos* disperses the coordinates and the definition of space as a measure of the exercise of the coercive monopoly in relation between States and together with the principles that support them concern the jurisdiction of the ICC (Tsilonis, 2019) and traces can be found in the imposition of a legality extraneous to the place of

application or in the consecration of individual responsibility (Bishai, 2013), international as criminal phenomena to the system. The change of global spaces must carry out the juridical reflection of a global spatial order as a transformation of international law from a typical model of war inspiration to a universal one of jurisdiction in the face of the punishment of serious violations against human rights both in peace and in war. A peculiar and complex system given its astuteness especially at the level of procedural mechanism with regard to the effects of the principle of complementarity and due to the reticular logic that characterizes it. A model of interaction between multiple national and international preceptive levels with multiple national and international competent jurisdictions. A law that satisfies a legal pluralism (Greenawalt, 2011; Van Sliedregt, 2012) intended to reconcile multiple variables of various different cultures of conception of justice.

Despite the fact that it becomes difficult to distinguish in the field and in principle "the reason of State" which for centuries have constituted the undisputed stylistic features of the internal juridical body of the individual state systems and of international relations at a global level. The StICC as the main objective and as a target of criticisms of various kinds aimed at questioning the abstract proposibility that respects the traditional functions attributed to the penalty which includes: general and

special prevention and retribution of the new peculiarities and purposes of this form of international jurisdiction (Tsilonis, 2019; Werle, Zimmerman, 2019).

The StICC is of an overabundant, hyperbolic nature with many objectives that respects the really achievable ones, i.e. the essential core of the critical remarks formulated in the national criminal law (Wippman, 2004; Damaška, 2008). The penal intervention of any sound system is oriented towards the punishment of wrongdoings, general prevention, neutralization and, rehabilitation which lends itself to effective objections (Vasiliev, 2020). The functions take on characteristics of international criminal justice that can be considered irrelevant in the light of concrete facts. The retributive objective of the penalty is jeopardized by the disproportion between sanctions and enormity of the crimes subject to sentence. The reduction of the mere symbolic reaffirmation of the violated values of a preventive nature, neutralized weighs on the finding for those who will be called before the ICC (Werle, Zimmermann, 2019). This resocialization takes for granted the limit between proclaimed values and propagated models at the time of the commission of the crimes, given that what is a violation of human rights was not recognized as such in the country where the crime(s) was(were) committed. The tolerability of the costs of the system remains within this circle with respect to the

desirable aim which is that of a definitive penalty (Henham, 2003; Henham, 2005). More than a discourse of prevention, it seems to speak of repression of a symbolic nature. Obscurity has opposite effects where international criminal intervention affects only some perpetrators and not all those who have committed internationally prosecutable crimes.

Perhaps we can speak of a selective justice of a necessary nature that is easily exploited, politicized and full of partisan interests, above all of the victors (Lombois, 1971). A leitmotif that always comes up when a war ends and as we have experienced and noticed in the past from the Nuremberg period and beyond. If this is indeed the case, it is assumed that international penal coercion will be able to perpetuate the atrocities and hinder the complicated processes of social and ethnic reconstruction among the affected populations (Berlin, 2020). The first culprits are the heads of State, induced to resist and not lay down their arms before a stable international justice system. Transitions towards democratic models require essential and guaranteed prerequisites for dictators and their sclerotic apparatuses which are unlikely to destroy military and civilian powers. A rectangular and indispensable justice that now looks everyone in the face without lobbying interests, serving as a disincentive to peaceful political changes. It is now difficult to make predictions about the dissuasive effect of the threat of a criminal

penalty and its application in future situations. The *punctum dolens* in the practicability of a prophylaxis of fundamental human rights at an international level will be the peoples to seek for themselves and freely choose alternative forms to criminal justice, the settlement and overcoming of their own past (Henham, 2007a; Henham, 2007b; D'Ascoli, 2011; Henham, 2022).

The international community just complies. Certainly there will be many criticisms regarding the enhancement of the criminal sanction of the *jus gentium* and not a rational sanctioning response. It is a form of exclusion-oriented enemy criminal law. A system that is based on condemnation more than on ascertaining the truth where failure to condemn is perceived as a defeat of the organizational system (Pastor, 2006).

What are the typical functions of punishment?

The typical characteristics of international jurisdiction are not reconciled with all types of criminal law of national inspiration and as a consequence there emerges an immediate transposition of the purposes recognized to a state sphere as logical or incongruous effects which respect the very purposes of a very broad criminal system which goes beyond the limits of international criminal law and our investigation.

The fundamental objective is the eradication of impunity based

on the StICC and in its Preamble (David, 2013), viewed as the true vocation of undoubted functionality that continues to perpetuate itself towards the historical situation of impunity that respects the barbarism of core crimes (Ambos et al. 2022a), i.e. the chronic impunity that betrays the expectations of the victims (Safferling, 2021; Safferling, Petrossian, 2021) by avoiding the encouragement of similar crimes against others[10]. An unbearable scandal stone for the construction of a justice modeled and oriented towards the protection of fundamental rights[11]. International criminal justice characterized in a holistic and *contra factum* sense of the prosecution of serious crimes against humanity (Bassiouni, 2011; Werle, Jessberger, 2020) seems to represent an instrument of global struggle towards the culture of impunity (Akhavan, 2001; Saxon, 2015). Crimes that go unpunished under particular jurisdictions and remain so before

[10]According to n. 85 of the Rule of Procedure and Evidence: "(…) a) "victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; but also as a moral person referred to in point b) victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes (…)". See also from the jurisprudence: Affaire le Procureur v. Laurent Gbabgo, Décision relative à la participation des victimes et à leur représentation légale commune à l'audience de confirmation des charges et dans le cadre de la procédure y relative, 4 June 2012, ICC-02/11-01/11-138, par. 20; Pre-Trial Chamber II, Affaire le Procureur v. Uhuru Mugai Kenyatta, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/09-02/11-267, 26 August 2011, par. 40; Pre-Trial Chamber III, Affaire le Procureur v. Jean-Pierre Bemba Gombo, Quatrième décision relative à la participation des victimes, ICC-01/05-01/08-329, 12 December 2008, par. 30.

[11]According to Preamble of StICC, lett. 5: "(…) to put an end for the perpetrators of these crimes and thus to contribute to the prevention of such crimes (…)".

the international community. The principle of universality together with a decentralization of the repression of core crimes (Soler, 2019; Sato, 2021) is based on the competence of each State and where they have been committed towards a phenomenon of punishment without borders where the maximum violation of human rights continues to be a daily story. This retributive-symbolic aspiration is based on the preventive instance of punishment and that of appeasement[12]. A trend that we can see from the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) (Schabas, 2006). An international criminal justice where the retribution and deterrence of the ad hoc tribunals had assumed the indictment in the sense of:

"(…) primary purposes of sentence (…) to show the people of not only former Yugoslavia, but of the world in general, that there is no impunity for these types of crimes (...)"[13]. It is not only a symbolism but also a "war" against the culture of impunity which does not desire revenge but "expressing the outrage of the international community at these crimes (…)" (Stahn, Agius, Brammertz, Rohan, 2020; Zammit Borda, 2021)[14]. The ICTY itself already underlined the function: "(...) to create trust and respect for the developing system of international criminal justice (also assuming the perspective of the rehabilitation of the offender) (...)" (Benzing, 2003)[15].

[12]See the Report of the International Criminal Court of the United Nations for 2006-2007 of 31 August 2007: "(…) helping to put an end to impunity for the perpetrators of the most serious crimes, the Court is intended to contribute to the prevention of such crimes and the maintenance of peace and security (…)".

[13]ICTY, Prosecutor v. Duško Tadić, Judgment, IT-94-1-A, Appeals Chamber, 15 July 1999, par. 194.

[14]ICTY, Prosecutor v. Kordić & Ćerkez, 17 December 2004, Appeals Chamber, Judgment, IT-95- 14/2-A, "(…) the international tribunals is a vehicle which the international community expresses its outrage at the atrocities committed in the former Yugoslavia (…)".

[15]According to the author: "(…) as art. 124 pursuant to which a State may, at the

The auxiliary protagonist within this circle remains the principle of complementarity as an extension of and respect for the facts that the internal law of a nation has not been able and/or has not wanted to pursue and the international community must guarantee a repressive intervention by proposing to cover impunity. Competent body is obviously the ICC which belongs to it the K*ompetenz-Kompetenz* (Werle, Zimmermann, 2019; De Frouville, Decaux, 2020; Dupuy, Kerbrat, 2020; Aledo, 2021; Alland, 2021; Tomuschat, Walter, 2021; Kälin, Epifany, Caroni, Künzli, Pirker, 2022) which assumes an epochal task that respects the exercise of international criminal jurisdiction which abstractly remains within the sphere of the sovereignty of individual States.

The ideal of the fight against impunity remains the abstraction in the face of the persistent shortcomings of the StICC system. But isn't that normal? An important lack is the body of an ad hoc police capable of collecting evidence, carrying out searches, interrogating witnesses, making arrests in the territory of sovereign States and the insufficiency of investigative

time of filing the ratification, declare that it intends to exclude the exercise of the jurisdiction of the ICC, by way of derogation from art. 12 in relation to war crimes committed by its own citizens or in its own territory for a period of seven years starting from the entry into force of the Statute for the State in question, therefore the jurisdiction is excluded by a sort of potestative act of the single unquestionable adhering State for reasons of political expediency, connected to the need for national reconciliation. It is a profile that clearly puts a strain on the paradigm of criminal justice as an instrument in the battle against impunity which, as it pertains to absolute theories of punishment, should not be subordinated, at least in abstract terms, to considerations of political expediency (…)".

apparatuses and the relative resources, especially economic ones. The construction of this type of model of international criminal justice would be reduced given that, according to the doctrine, impunity will continue. Whoever commits atrocious crimes will be a free subject of the world community and of public opinion to continue committing massive violations of human rights and a certain devaluation of the validity of the international penal system (Duff, Garland, 1994).

Crimes are conceived as a development model designed as a mass crime. As well as the conditions for the transition to a new identity have a high payment cost to participate in a project where the acceptance of the judgment of individual responsibility respects the atrocities of the past on a global level (Berlin, 2020).

Absolutism or deontology?

Deontologism of punishment means absolute conception where independent justice (Werle, Jessberger, 2020) from the effects it will have finds cultivation in the mystique of human rights. The universality of their value seems to depreciate considerations of a purpose in a cynical and/or morally unfounded way, insignificant in comparison with comparable presuppositions. Where national jurisdictions are unable or unwilling to proceed to make it effective, the right and necessary motion of

international criminal law suggests international justice. But of what kind?

A dogmatic justice (Werle, Jessberger, 2020) based on reciprocity, on the perpetration of atrocities of similar magnitude which must respond to severe afflictions in an area that appears incontestable in the face of crimes that cannot be forgiven. The compensation for guilt (*Schuldausgleich)* proposed and elaborated by German doctrine (Werle, 1997) as compensation for the material injustice produced by a certain crime against humanity in interpersonal relationships that destroy civil coexistence (Gierhake, 2005; Gierhake, 2008)[16] together with neo-Kantian theories, assumes punishment as the restitution of violated global law. A restitution that also includes the conditions that were possible for the restoration of world peace as a legal one. As a first condition we can consider the postulate of the recognition of global citizenship (Gierhake, 2008). But is this way possible? The idea of retribution in the field of international criminal law has an ethical character above all in the penalty which highlights its own "*sittenbilden den Kraft*" (Jescheck, 1952).

The coordinates for maintaining peace do not emerge from the intonation of a kerygmatic nature but from the normative foundation where we read in the Preamble of the StICC (lett. 5)

[16]"(…) Ausgleich der durch ein völkerrechtliches verbechen ausgelösteten materiellen Ungerechtigkeit im Interprersonalverhältnis (…)".

(David, 2013) in the desire to put an absolute end to impunity. The penalty assumes the function of compensating the offense from the point of view of the "free rider" as a negotiating perspective which sees in the crime the unfair advantage of the offender without paying the due price, the reaction to the crime committed, i.e. a retributivism of a symbolic nature (Morris, 1976; Hoyer, 1996)[17]. According to lett. 4 of the Preamble StICC (David, 2013; Ambos, 2022a) the most serious crimes concern the international community as a whole and cannot continue to go unpunished and their repression must be guaranteed by operating explicitly to the deontological logic of the function itself.

In fact, there is an overlap between two logically distinct planes. Retribution is referred to as an unambiguous relationship between penalty and crime or guilt and as a function of graduation of the sanction as a proportion that must constitute a retribution which in reality is not a function referred to the guarantee principle of retributivity or necessary consequentiality of the penalty to the crime, i.e. *nulla poena sine crime* (Kress, 2010). Two incommensurable dimensions. One oriented towards

[17]According to Morris: "(…) the perpetrator benefits from the protection of the criminal law he violated as well as from the special protection that the legal system guarantees to the accused but does not suffer from the restrictions that each citizen must impose on himself by moderating his behavior in accordance with the law. For this reason it is necessary to re-establish the broken balance by forcing the offender to suffer at least theoretically equivalent weight (...) a somewhat analogous conception, which recognizes in the illicit act a legal transaction taxed with the penalty (...)".

the justification of the penalty and its afflictivity and the other towards the guarantees of the individual.

The intolerability of impunity seems to establish a necessary connection between retribution and revenge given that the character of retributive justice as an external envelope has not been lacking, i.e. in the face of massive atrocities and the expectations of the victims that this "legal" form (Berlin, 2020) is motivated according to the nature and disvalue of the facts by covering the reality of a real, just and reasonable retaliation. This model distances the revenge of private individuals and prevents the victim from committing not only to take justice into their own hands but also in the silence of the public apparatus of coercion which draws attention to historical facts and their own experiences. Punishment as a logical and retrospective objective, given that punishment also has a retroactive and past character: *punitur quia peccatum est* does not present itself as a single and deterrent vocation (Dutton, 2017). The penalty serves to break revenge and reactions and to curb the infinite dynamics of violence and the expansive neutrality of the conflict by proposing ways of rationalizing "substitute response" according to the principle of personal responsibility, to the quantum of guilt of the single individual surrounding the guarantees of the international criminal process as a public process (Heller, Mègret, Nouwen, Ohlin, Robinson, 2020).

Functional retribution with psychosocial purposes as we see from the jurisprudence of the ad hoc tribunals where retribution is placed as a relief between "primordial" functions of the sentence, (Yee, 1997; Joyce, 2004; Cronin-Furman, 2013; Jarvis, 2017; Liakopoulos, 2019c)[18] and as a measure to graduate the sentence, i.e. the response to adequate reparation for the suffering of the victims (Cohen, 2020)[19]. Primordial punishment which in the Celebiči case includes not only the primordial but also the retributive character of the penalty where the prejudice of re-establishment and maintenance of peace concerns violence[20]. Retributionism also contains the constituent capacity that it can exert. It is believed that the punishment of great criminals contributes to the society in transition a considerable advance in the direction of reconstruction of the legal and moral order deriving from the continuing impunity of serious human rights violations on a level of legitimization (Van

[18]ICTY, Prosecutor v. Dražen Erdemović, Judgment, AC, IT-96-22-A, 7 October 1997, par. 65 and the Joint Separate Opinion of judge McDonald and judge Vohrah, parr. 21, 25 (Oct. 7, 1997): "(…) A prohibited act committed as part of a crime against humanity, that is with an awareness that the act formed part of a widespread or systematic attack on a civilian population, is, all else being equal, a more serious offence than an ordinary war crime. This follows from the requirement that crimes against humanity be committed on a widespread or systematic scale, the quantity of the crime having a qualitative impact on the nature of the offence which is seen as a crime against more than just the victims themselves but against humanity as a whole (…)". ICTY, Prosecutor v. Furundžija, Case No. IT-95.17/1-T, judgment, 23 July 2009, par. 288.

[19]See the Resolution n. 955 of 1994, UN Doc. S/Res/955 (1994).

[20]ICTY, Prosecutor v. Delalić et al., Appeals Chamber, IT-96-21-A, 20 February 2001, par. 1231.

Haersolte, 1965)[21]. In this perspective of healing historical wounds and repairing the damage caused by the previous regime, the retributive penalty is recognized (Cohen, 2020). It is a type of social "cleansing" where through symbolic protocols the definitive estrangement is removed from the high levels of state management which must no longer return to retaliation as a consequence of a process traced to the absolute theory conveyed to the dimension of a special prevention which addressed to the victim.

A model assimilated to international justice that culminates in the prosecution and conviction of the guilty. The penalty which is useless and does not conform to an ideal absolute justice loses this connotation in the face of an international penal intervention of humanitarian inspiration which succumbs and is activated to a retributive perspective with a symbolized inexorability as described by Kant in his *"Inselbeispiel*" and also in his personalistic accent on the centrality of respect for the human dignity of the offender, as an end and not a means where it converts into the legal form of winning investiture, to a reaffirmed and unconditional value of the prerogatives of law which represents an absolute theory (Lewis, 1972; Morris,

[21]"(…) the idea of retribution as an existential necessity, useful to create a belief in a justice on earth and thus to cement the state and its grip on citizens (…) the condemnation of a great criminal dictator would serve not so much to intimidate other tyrants, but rather to impress all future offenders (...)".

2000)[22]. In this sense, just deserts risks translating into a procedurally refined legitimization of the ideology of *vae victis* (Braithwaite, Pettit, 2002; Braithwaite, 2015).

The assignment to criminal law of tasks of absolute justice is accused of inconsistency in the face of a crime paradigm, of criminal phenomena that characterizes the maxi dimensionality (Brugger, 1996), due to the high number of victims thought of as entities. The continuous and enormous phenomenon of these means used makes any type of sanctioning response trivial, inadequate and disproportionate. The retributive perspective reduces the symbolic reaffirmation of violated values. The complexity of the eligibility and possible functional relocation of remuneration appears a mere *flatus vocis* in the face of the enormity of the facts that compensate for the seriousness (Shaked, 2015)[23]. Retribution in the face of core crimes (Soler, 2019) in terms of dimension skips any compensation parameter and any penalty, even that of death, appears disproportionate by default (Merle, 2009). Thus even a high sentence remains incapable and meaningless in the face of the enormity of the facts committed and victimization effects arise which in reality

[22]According to Lewis: "(…) the concept of desert is the only connecting link between punishment and justice (…) when we cease to consider what the criminal deserves and consider only what will cure him or deter others we have tacitly removed him form the sphere of justice object, a patient a case (…)".

[23]According to the Israelian Supreme Court in case of Eichmann: "(...) just as in human language there are no suitable words to describe what the defendant did, so in human law there is no punishment sufficiently severe to reflect his guilt (...)". Attorney General of the Government of Israel v. Adolf Eichmann, 36 ILR 277, p. 342.

publicly create martyrs for those responsible.

The remuneration model accepts the perspective of the ability to guarantee proportionality between the fact and the sanction in consideration of how international justice lacks adequate investigative tools and not as we have in the domestic penal system. Inadequate systems to reach even the main defendants where the penal intervention is not enough to be selective. Perhaps we can speak of a “mild” and/or “blind” justice in the face of a living reality that is itself the object of judgment. The risk of marking the peoples involved even more seriously marks the social fabric, jeopardizing the now fragile peace processes and with questionable balances.

Towards a “victim conscious retributivism”

The link between the retribution matrix that characterizes international criminal justice for the protection of human rights and in the orientation of victims' expectations of justice is the so-called victim conscious retributivism (Logodny, 2001). An individual conception of victim justice where the rationale supports the duty of society to follow up and punish crimes (Saferling, 2021). A community that ignores the victims despite knowing that they exist, marginalizing them as an essential portion of the social identity that behaves as an accomplice, co-responsible for a crime that denies its own nature. As G.

Fletcher states: “the victim's blood is on our hands” (Fletcher, 1995; Holder, 2018). A victimology that needs solidarity intervention and not only pertaining to a deontological justice. This circle seems more in line with the jurisdiction of the ICC (Tsilonis, 2019; Cormier, 2020) where the same StICC clearly recognizes the victims who are granted procedural powers for their rights. Within this spirit we notice a difference of the ad hoc tribunals where the victims have no voice with respect to the mechanism of prosecution of the crimes, in addition to not only possessing a unique face! Victims need to be included in the justice mechanism at the international level since we are talking about victims: ethnic, racial, religious or national group when dealing with the crime of genocide (Behrens, Henham, 2013) and so on. Victims as a whole who must have procedural rights to the proof of non-symbolic but concrete facts reflecting the retributionist ideology of global intervention having a limited impact in correcting the structural weakness that constitutes sentencing at an international level.

From a theoretical point of view, one difficulty remains that of the absolute conception of punishment which also marks the victim conscious retributivism which paves the way for the ICC to prosecute crimes against humanity (Morales, 2020) with a moral obligation beyond any other consideration of derogable opportunity, a non-negotiable right of the victims. The

perplexities of this perspective of an "aggregative" nature (Berlin, 2020) call for international jurisdiction (Cormier, 2020) as a reduction of the global injustice quotient with the consequentialist substratum that legitimizes injustices for good committed by institutional apparatuses (Dana, 2014)[24]. Minimize in justice view (Blümmel, 2002) serves to decrease the number of deprivations of a coercive apparatus where the individual is often "forced" to exercise. It is the logic of the enemy's criminal law that leads to justifying a collective good and sporadic or not violations of human rights. A documented reality that victims against humanity are immune from vengeful desires and require the discovery of the truth, awareness and responsibility on the part of the offender.

Retribution as a negative analogical reproduction of the fact does not actually satisfy the victims but undermines the prerogatives, i.e. the *topos* of the settings that shun a paradigm of justice based on reciprocity and divided into two different profiles. The first seems to be that on a psychological level the victims of serious crimes expect effective revenge in the sense that only retaliation appears as a means of harm and an adequate measure to restore the violated justice (Danner, 2001; Beresford,

[24]"(…) the goals they seek to achieve with their sentencing reductions, like reconciliation, are beyond the immediate capacity of criminal courts. International prosecutions should assume a more modest posture regarding its capabilities, lest it damages its core responsibility of punishing perpetrators of atrocities crimes. This is not to say that international criminal justice cannot contribute to these aspirations, but rather that it should not be given weight as a factor in sentencing (…)".

2001; Hole, 2005; Harmon, Gaynor, 2007; Hale, 2007; Mujuzi, 2010; Margetts, Kappos, 2012; Nowak, 2013; Zakerian, Alikhani, 2013; Hola, 2014; Doherty, Steinberg, 2016; Fernàndez-Pacheco Estrada, 2017; Jarvis, 2017; Aliňàn, Ollè Sesè, 2018)[25]. From this point of view, a rational penal

[25]See ex multis: ICTY, Prosecutor v. Aleksovski, Trial Judgment, IT-95-14/1-T, 25 June 1999, par. 185: "(…) Retribution is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes (…) a sentence of the International Tribunal should make plain the condemnation of the international community of the behavior in question and show that the international community was not ready to tolerate serious violations of international humanitarian law and human rights (…)". Prosecutor v. Dragoljub Kunarac, 16 June 2002, Appeals Chamber, Judgment, IT-96- 23& IT-96-23/1-A, par. 840: "(…) unless it can be shown that a particular convicted person has the propensity to commit violations of international humanitarian law, or, possibly, crimes relevant to such violations, such as "hate" crimes or discriminatory crimes, it may not be fair and reasonable to use protection of society, or preventive detention, as a general sentencing factor (…)". ICTY (Appeals Chamber), Prosecutor v. Delalić et al. ("Čelebici Camp"), sentence of 20 February 2001, par. 806. Prosecutor v. Milutinovič et al., Judgment, Case No. IT-05-87-T, Trial Chamber, 26 February 2009, para.1144. Prosecutor v. Kajelijeli, Judgment, Case No. ICTR-98-44A, Trial Chamber II, 1 December 2003, para. 945; Prosecutor v. Gacumbitsi, Judgment, Case No. ICTR-2001-64, Trial Chamber III, 17 June 2004, para. 335; Prosecutor v. Kamuhanda, Judgment, Case No. ICTR-99-54A, Trial Chamber II, 22 January 2003, para. 755; Prosecutor v. Muhimana, Judgment, Case No. ICTR-95-1B, Trial Chamber III, 28 April 2005, para. 588. Prosecutor v. André Ntagura, Emmanuel Bagambiki, Samuel Imanishimwe, Judgment, Case No. ICTR-99-46-T, Trial Chamber III, 25 February 2004; Prosecutor v. Rugambarara, Judgment, Case No. ICTR-0059-T, Trial Chamber II, 16 November 2007; Prosecutor v. Sikirica et al., Judgment, Case No. IT-95-8-S, Trial Chamber III, 13 November 2001; Prosecutor v. Krstić, Judgment, Case No. IT-98-33, Trial Chamber, 2 August 2001; Prosecutor v. Rukundo, Judgment, Case No. ICTR-2001-70-T, Trial Chamber II, 27 February 2009; Prosecutor v. Kvočka et al., Judgment, Case No. IT-98-30/1-T, Trial Chamber, 2 November 2001. Prosecutor v. Jokić, Sentencing Judgment, Case No. IT-01-42/1-S, Trial Chamber I, 18 March 2004, para. 36, Prosecutor v. Obrenovič, Sentencing Judgment, Case No. IT-02-60/2-S, Trial Chamber I, Section A, 10 December 2003, para. 53. Prosecutor v. Krajisnik, Judgment, Case No. IT-00-39-A, Appeals Chamber, 17 March 2009, para. 808. Prosecutor v. Mucič et al., Judgment, Case No. IT-96-21-T, Trial Chamber, 16 November 1998, paras.1231-1235. Prosecutor v. Plavsić, Sentencing Judgment, Case No. IT-00-39&40/1-S, Trial Chamber, 27 February 2003, para. 22. Prosecutor v. Krnolejač, Judgment, Case No. IT-97-25-T, Trial Chamber II, 15 March 2002, para. 508; Prosecutor v. Simić et al., Sentencing Judgment, Case No. IT-95-9/2-S, Trial

intervention is not oriented towards satisfying desires, feelings or emotional drives but assumes the real interests of the victims and certainly does not give the exclusive and legitimate answer of the possibility of using non-penal instruments[26]. More appropriate tools for recognizing the status of victims (Blumenson, 2006; Clarik, 2011; Wegner, 2015). This

Chamber II, 17 October 2002, para. 33. Prosecutor v. Jelisič, Judgment, Case No.IT-95-10-T, Trial Chamber, 14 December 1999, para.121. Prosecutor v. Rutaganda, Judgment, Case No. ICTR-96-3-A, Appeals Chamber, 26 May 2003, para. 591. Prosecutor v. Setako, Judgment and Sentence, Case No. ICTR-04-81-T, Trial Chamber I, 25 February 2010, para. 500. Prosecutor v. Ndindabahizi, Judgment and Sentencing, Case No. ICTR-01-71-I, Trial Chamber I, 15 July 2004, para. 502. Prosecutor v. Elizaphan and Gerard Ntakirutimana, Judgment and Sentence, Case No. ICTR-96-10 & ICTR-96-17-T, Trial Chamber I, 21 February 2003, para. 781. Prosecutor v. Kupreškić et al., Judgment, Case No. IT-95-16-T, Trial Chamber, 14 January 2000, para. 751. Prosecutor v. Hadžihasanović & Kubura, Judgment, Case No. IT-01-47-A, Appeals Chamber, 22 April 2008, para. 317. Prosecutor v. Galić, Judgment and Opinion, Case No. IT-98-29-T, Trial Chamber I, 5 December 2003, para. 758; Prosecutor v. Krstič, Judgment, Case No. IT-98-33-T, Trial Chamber, 2 August 2001, para 701. Prosecutor v. Popović et al, Judgment, Case No. IT-05-88-T, Trial Chamber II, 10 June 2010, para. 2134. Prosecutor v. Orić, Judgment, Case No. IT-03-68-T, Trial Chamber II, 30 June 2006, para.724. Prosecutor v. Seromba, Judgment, Case No. ICTR-2001-66-I, Trial Chamber, 13 December 2006, para. 390. Prosecutor v. Ndindabahizi, Judgment, Case No. ICTR-01-71-A, Appeals Chamber, 16 January 2007, para.122. Prosecutor v. Karera, Judgment and Sentence, Case No. ICTR -01-74-T, Trial Chamber I, 7 December 2007, para. 579. Prosecutor v. Babič, Judgment on Sentencing Appeal, Case No. IT-03-72-A, Appeals Chamber, 18 July 2005, para. 61; Prosecutor v. Simić et al., Judgment, Case No. IT-95-9-A, Appeals Chamber, 28 November 2006, para. 265. Prosecutor v. Bagosora et al., Judgment and Sentence, Case No. ICTR-98-41-T, Trial Chamber I, 18 December 2008, para. 2270. Prosecutor v. Krnolejać, Judgment, Case No. IT-97-25-A, Appeals Chamber, 17 September 2003, para.75. Prosecutor v. Rutaganda, Judgment and Sentence (ICTR-96-3-T, Trial Chamber, 6 December 1999, para. 470; Prosecutor v. Stakić, Judgment, Case No. IT-97-24-A, Appeals Chamber, 22 March 2006, para. 413: "(…) circumstances relating to a defendant's participation in individual attacks, such as "enthusiastic/active participant (…) leading role in some attacks (…) commission of some of the offences by more than one perpetrator at the same time (…) direct participation in crimes by a high ranking accused (…) acting as accomplice in addition to committing a crime (…)". Prosecutor v. Vasiljević, Judgment, Case No. IT-98-32-A, Appeals Chamber, 25 February 2004, paras.161-162. Prosecutor v. Kvočka et al., Judgment, Case No. IT-98-30/1-A, Appeals Chamber, 28 February 2005. Prosecutor v. Kayishema & Ruzinanda, Appeal Judgment, Case No. ICTR-95-1-A, Appeals Chamber, 1 June 2001, para. 351. Prosecutor v. Lukić & Lukič,

conception is not comparable to the so-called restorative justice and is not incompatible in terms of sanctioning mechanisms that can be adopted on a collective scale between the parties (Kelder, Barbora Holà, Van Wijk, 2014). Instead, victim conscious retributivism (Galbraith, 2012; Woods, 2012; Haque, 2013) remains a state monopoly in objective justice. Non-cognitive

Judgment, Case No. IT-98-32/1-T, Trial Chamber III, 20 July 2009, para. 1067; Prosecutor v. Serushago, Sentence, Case No. ICTR-98-39-S, Trial Chamber I, 5 February 1999, para. 30. Prosecutor v. Vasiljević, Judgment, Case No. IT-98-32-T, Trial Chamber II, 29 November 2002, para. 278. Prosecutor v. Jokić, Sentencing Judgment, Case No. IT-01-42/1-S, Trial Chamber I, 18 March 2004, para. 849 Prosecutor v. Mrđa, Sentencing Judgment, Case No. IT-02-59-S, Trial Chamber I, 31 March 2004, para. 46-48. Prosecutor v. Bisengimana, Judgment and Sentence, Case No. ICTR-00-60-T, Trial Chamber II, 13 April 2006, para. 120. Prosecutor v. Mrkšić, & Šljivančanin, Judgment, Case No. IT-95-13/1-T, Trial Chamber II, 27 September 2007, para. 704. Prosecutor v. Nchamihigo, Judgment and Sentence, Case No. ICTR-01-63-T, Trial Chamber III, 12 November 2008, para. 392. Prosecutor v. Zigiranyirazo, Judgment, Case No. ICTR-01-73-T, Trial Chamber III, 18 December 2008, para.465. Prosecutor v. Bralo, Sentencing Judgment, Case No. IT-95-17-S, Trial Chamber, 7 December 2005, para. 72. Prosecutor v. Blaškić, Judgment, Case No. IT-95-14-A, Appeals Chamber, 29 July 2004, para. 705: "(…) Trial Chamber rejected to mitigate Blaškić's sentence on account of his remorse. It considered his remorse insincere stating that: "there is a flagrant contradiction between (his remorseful conduct during the proceedings) and the facts has established- having given orders resulting in the commission of crimes the accused cannot claim that he attempted to limit their consequences. His remorse thus seems dubious (…) on appeal, however, the appellant presented new evidence that to a large extent rebutted the Trial Chamber's findings of his guilt. He was acquitted on many counts and his sentence substantially reduced. With respect to the alleged remorse, the Appeals Chamber qualified the finding of the trial Judges and considered his remorse sincere and genuine. It took into account its own assessment of trial record and the new evidence admitted on appeal and emphasized the fact that his criminal conduct (as modified on appeal) is only very limited and there is a substantial evidence that he issued "the so-called humanitarian orders" (…) (par. 768): The fact that the accused did not directly participate may be taken as a mitigating circumstance when the accused held a junior position within the civilian or military command structure. However, the Trial Chamber considers that the fact that commanders (…) played no direct part cannot act in mitigation of the sentence when found guilty (...)". Prosecutor v. Naletilić & Martinović, Judgment, Case No. IT-98-34-T, Trial Chamber, 31 March 2003, para. 754; Prosecutor v. Nahimana, Barayagwiza, Ngeze, Judgment, Case No. ICTR-99-52-A, Appeals Chamber, 28 November 2007, para. 1069. Prosecutor v. Muvunyi, Judgment and Sentence, Case No. ICTR-2000-55A-T, Trial Chamber II, 12 September 2006, para. 540; Prosecutor v. Todorović, Sentencing Judgment, Case No.

expectations but of a rationalized nature take on a real, non-symbolic refreshment. Its functionality reaffirms the equal moral condition of the victims towards all the associates and the punishment must be oriented towards satisfying the desires or requests of a subjective nature of the victims themselves.

The penalty in international jurisdiction takes on the role of an instrument that breaks the circuit of revenge, where it does not involve an impartial authority with the task of connecting atrocities and individuals with objective rules of responsibility.

IT-95-9/1-S, Trial Chamber, 31 July 2001, para. 113: "(…) principle of retribution, if it is to be applied at all in the context of sentencing, must be understood as reflecting a fair and balanced approach to the exaction of punishment for wrongdoing. This means that the penalty imposed must be proportionate to the wrongdoing; in other words that the punishment be made to fit the crime. The Chamber is of the view that this principle is reflected in the account, which the Chamber is obliged by the Statute and the Rules to take, of the gravity of the crime (...)". Prosecutor v. Zelenović, Sentencing Judgment, Case No. IT-96-53/2-S, Trial Chamber I, 4 April 2007, para. 52; Prosecutor v. Kordić & Čerkez, Judgment, Case No. IT-95-14/2-T, Trial Chamber, 26 February 2001, paras. 845, 854-856; Prosecutor v. Muhimana, Judgment, Case No. ICTR-95-1B-A, Appeals Chamber, 21 May 2007, para. 234. Prosecutor v. Rajić, Sentencing Judgment, Case No. IT-95-12-S, Trial Chamber I, 8 May 2006, para. 82; Prosecutor v. Mrkšić & Šljivančanin, Judgment, Case No. IT-95-13/1-A, Appeals Chamber, 5 May 2009, para. 375; Prosecutor v. Kajelijeli, Judgment, Case No. ICTR-98-44A, Appeals Chamber, 23 May 2005, para. 294; Prosecutor v. Kamuhanda, Judgment, Case No. ICTR-99-54A-A, Appeals Chamber, 19 September 2005, para. 359; Prosecutor v. Brđanin, Judgment, Case No. IT-99-36-T, Trial Chamber II, 1 September 2004, para. 1093. Prosecutor v. Limaj et al., Judgment, Case No. IT-03-66-T, Trial Chamber II, 30 November 2005, para.724. Prosecutor v. Banović, Sentencing Judgment, Case No. IT-02-65/1-S, Trial Chamber, 28 October 2003, para.36.

[26]ICTY, Trial Chamber, Prosecutor v. Todorović, Decision on Prosecution Motion to Withdraw counts, IT-95-9/1-I, 26 February 2001, par. 29. ICTY, Prosecutor v. Sikirica, Došen and Kolundžija, Case n. IT-95-9/1-S, Trial Chamber III, judgment and Sentence, 13 November 2001, par. 97.

A type of maintenance of a *lato sensu* retributive connotation aiming at preventing the unstoppable development of ways such as reprisals, forms of do-it-yourself justice, lynchings, etc.

The experience of ad hoc tribunals teaches how the retributive connotation of the penalties imposed in compensation for the victims of atrocities has had the opposite effect by reinforcing feelings of hostility and the impulses for revenge. Thus conflict and the request for exemplary punishments against the opposing party increase and distance the prospect of forms of conciliation and mediation which are oriented towards the reconstruction of internal peace, i.e. retribution legitimized as a criterion for circumscribing the penalty and as a proportion compared to the fact. Considerations that lead to the consideration of the penal sanction and not to the possible means of this obligation and of the community to express the relative repudiation.

A valued and absolute perspective that assigns the function of restoration to the penalty, despite the fact that it is not in keeping with the Preamble of the StICC (David, 2013) and with the jurisprudence of the ad hoc tribunals. Punishment as a function of restoring the order of justice, as a balance of advantages and prerogatives between criminal and citizen. A choice within the confines of the law as a choice made by the offender for his own personal interest and for the common good. In this case, the criminal law appears as a perspective of the seal of every

national order, as a guarantee and seal of the conditions of existence of the proper meaning of the guarantor authorities and of relational equality in the treatment of citizens. As an assignment of rights and obligations according to worthiness, ability, needs, guilt, in two words of the exercise of distributive justice. An axiological path that proves right even in the path of impunity evoked as a justification of the system of international criminal law (Friman, Robinson, Wilmshurst, 2010).

(Follows) The distributive function

Distributive justice seen as non-retribution to the guilty offense deserving punishment and as something concerned with the distribution of risks and offences. In a nutshell, whoever is not guilty actually attacks the sphere of other subjects and produces a complex risk situation from which injuries and the victim as the perpetrator himself return where the passive subject reacts by defending himself. In this case, the penal intervention fits into the context of the conflict of a distributive nature where the sanction against preventive theories, i.e. that of reductionism that prevention would only serve to counteract recidivism, disperses the meaning of the primacy of the penalty.

When the penalty is imposed, it certifies that the related crime has not been prevented and that the system has failed. The occurrence and perpetuation of an unjust situation of the

distribution of the consequences of the risk of crime is prevented. In this circle, international criminal justice (Heller, Mègret, Nouwen, Ohlin, Robinson, 2020) is implicit and remade to a model of a supra-state nature. The aim seems to be to settle the perpetuation of the macroscopic situations especially of the victims of mass crimes and without perpetrators (Cronin-Furman, 2013). Criminal law as an instrument of distribution of responsibility and in its naivety is a possible flaw in the system of criminal law *iure gentium*. The correct allocation of the consequences of the risks justify the majority of cases in which the orders, programs and superordinate decisions from which the criminal phenomena of this system originated were initiated. This approach is linked to the type of justice that international criminal intervention embodies. A jurisdiction with a natural vocation towards the knowledge of facts concerning the society or the community in transition. It would be unfair to incriminate States that have undergone profound and radical transformations and which are responsible for previous power structures.

The deserving of the penalty as an operation of the excriminants is a ratio of the infliction of the penalty which is in a relationship of fairness where it is understood that the limit of criminal responsibility is only a guilty and proper fact. This is a variant of preventive conceptions. As a peculiarity rather than a prevention of committing other new crimes, the consequences deriving

from the crime committed are neutralized, at least on a symbolic level. The *deminutio* that it creates and any effective reactions remain as a cost that only the victim pays and that returns to the responsibility of whoever culpably produced them.

Instrumental punishment: Between theories of relativism and consequentialism

The consequentialist model justifies the penal intervention that characterizes the possible empirical verification, that is the outcomes through the infliction of the punishment, the desirable social effects in terms of deterrence, the re-education of the offender which must be compared and balanced concretely with the possible negative consequences, i.e. suffering inflicted, collateral damage, related to criminal penalties, etc. (Nemitz, 2002). In this spirit we recall the second part of lett. 5 of Preamble of StICC which affirms that: "(...) to contribute to the prevention of such crimes (…)" (David, 2013; Ambos, 2022a). What does this statement reveal in relation to our investigation of the punishment?

An objection of a moral nature within the risk of exploiting the innocent for the purpose of crime prevention and in the face of an absolute prohibition of sacrificing individual rights for social ends (Rawls, 1972; Dworkin, 1978). When we speak of perpetrators, we are dealing with objects incapable of

manipulating responsible subjects and deserving of relative respect (Duff, 1986). A second objection falls on the ground of consequentialist theory, i.e. of its own effectiveness and empirical level. The traditional criticism of the inadequacy of the purposes of the penal instrument takes on a definite meaning and respect for macro-dimensional and widespread phenomena such as those affecting humanitarian penal law. The same Preamble in lett. 11 StICC affirms that: "(…) to guarantee lasting respect for the enforcement of international justice (...)", i.e. as a function of cultural, moral orientation and for pedagogical purposes (Ambos, 2022a).

We are talking about an execution of the punishment that can also offer the relative sentence as stated in art. 110 which addresses the reasons that legitimize the ICC to reduce the punishment during execution, where it is noted that: "(...) clear and significant change of circumstances (...)" (Ambos, 2022a). As can also be read in the Regulation Procedure and Trial and in particular to Rule 223 letters a) and b) which refers, in a special preventive perspective and to the relative reintegration, to the demonstration of the offender to dissociate from his crime and the relative conduct during his detention. In the same Rule 223, letters c) and d) also provide for limitations on the granting and reduction of punishments and the risk of social instability within the repercussions on the victims and their families (Ambos,

2022a).

Negative general prevention v. systemic crime phenomena. Ineffective results of punishment

The threat of punishment is an important factor in relation to criminal forms predicting future human rights violations and as a work of intimidation. Deterrence from future human rights violations accompanies the StICC (Goldstone, 1998; Roggemann, 1998; Tolmein, 2001; Triffterer, 2002; Bagaric, Morss, 2006; Dona, 2014; Combs, 2016; Riegler, 2020). A position that respects the traditional conception of the function of punishment in the criminal law tradition and emphasizes preventive measures, i.e. respect for future wars, massacres and acts of aggression. International jurisdiction through the StICC is now permanent and assumes a national identity and pride against the social hatred of propaganda, ideological distortion by charismatic political leaders and generalized violence and reprisals (Mcgoldrick, 2004).

The prosecution of crimes against humanity (Mettraux, 2002; Mettraux, 2020) contributes to justice and repression of the past, individual and collective, and to favoring a decrease in their support commission for the restoration of peace and international security. The renunciation of facts, of identifying

those responsible, of encouraging the various types of criminals perpetuates resentment and violence (Minow, 1998). A fairly naive ideology of deterrence and as an overestimation of the psychological effects of the penalty. The offender does not resolve the crime by making a cold and precise calculation of costs and benefits. The penal intervention, and the execution of the penalty is one of the means of social control that operates in the context and in synergy with them with the effects of the criminal sanction as indemonstrable on an empirical level and in the sense that the disappointing result is not possible to deduce the failure and success of general negative prevention itself (Prittwitz, 2003).

Any discourse on the concrete functioning of criminal law is underlined in the deprivation that demands punishment by guaranteeing the reduction of crime and public safety. Of course it is difficult to sort out the relative consequences of deterrent paths where the crime is the consequence of a chain of vendettas motivated by ethnic or ideological groups or based on a climate in which the psychic influences are oriented towards fomenting violence which are far superior to the derivation the threat, even if only, of the penal sanction. Position that is inspired by thinking about the massacres of Srebrenica and Kosovo from the past and how they are dealt with after at the ICTY (Henham, 2005; Bassiouni, 2006).

General prevention of a negative nature is based on the representation of a credible threat that characterizes the function affected by the conditions of effectiveness, also by the situation in which the global political order of power relations finds itself. Within this spirit, the penalty achieves the concrete objectives in terms of general negative prevention and respects the doubtful areas, i.e. the probabilities of effectiveness of the penal intervention. All conceptions of the preventive or consequentialist *lato sensu* type (Dana, 2014) are easily refuted because they are re-read as a contingent circumstance that respects a commitment that we see perhaps in the near future from the Assembly of States Parties when we are ready to review and modify the StICC. Positive deterrent effects can be calculated against military and political leaders who are responsible for the planning and rational organization of large massacres and the creation of an environment where extraordinary crime-oriented relationships are the norm (Jescheck, 1952). The prospect of certain prosecution is also taken into account, which constitutes a decisive disincentive for regime leaders to abdicate from power and allows for transitional status (Sutter, 2006).

An effective deterrence ideology of exemplary sentences that is within the circle of deactivation of relations to the criminal command and towards megalomaniacal, hysterical and

centralizing leaders with their subordinate subjects to continue to obey their orders of "power" (Akhavan, 2001). This is the logic of the prevention of punishment in the international arena that emerges from an affected orientation more than anything else that can be maneuvered with considerable perplexity where the point of legitimacy of this arrangement is based on the principle of equality. A criminal system where deterrence seems to be jeopardized by the conformity of a normal system of deviant behavior, where the abuse of power in these contexts already takes place at the level of legislative power as a prediction of causes for the exclusion of punishability.

The transition is completed through the changed historical and social conditions that overcome in time the conflict cleared of the land where the crimes were perpetrated and the same structures of the rule of law guarantee the danger of relapses in forms of macro-criminality to the system. A system that perfectly and easily integrates the assessment of the preventive effects of a sanction that addresses a historical past, where the penal sanction seems quite useless *ex tunc* and because the subjects are subjected to the judgment of the ICC. Deterrence can only remain an abstract declaration of intent:

"(...) if only one takes into account the truly extraordinary circumstances in which these crimes were committed, and could still be committed in the future (…)" (Arendt, 2005).

Within this ideological model, international criminal law that seeks to protect human rights (Schabas, 1997) should also

address the exceptionality of situations as an object of judgment. Every argument of effectiveness and empirical demonstrations, above all with respect to the crimes committed in extraordinary contexts, make way for the deterrent functionality of the penalty in positive and negative ways. The observation of the current lack of coercive instruments which are missing from the ICC allows us to speak of an unarmed justice (Möller, 2003)[27].

An armed international criminal justice where it would be difficult to save the fundamental objection of an ideology that undoubtedly establishes the legitimacy of the entire system. It will be difficult to foresee or assume to see members who are part of the Security Council of the United Nations (Trahan, 2020) or still signatory members of the StICC (Liakopoulos, 2020a) being prosecuted by the ICC. The insistence on the preventive perspective appears as an offer of a convenient tool in the hegemonic States that deliver justice to responsible citizens as less influential on an international level. We want to legitimize a partial selectivity in prevention oriented towards the transformation of criminal juridical intervention, of humanitarian and war intervention analogously of global economic resources.

[27]The author suggests: "(...) on the basis of the historical experience which has seen the risk of using atomic bombs averted through the strategy of the balance between the world powers, to apply the same model also to international criminal justice, providing in the future the ICC (...) of tools such as to place it in a position of armed balance against macro-crime (...)".

Positive prevention. Punishment for future generations

The theory of general positive prevention comes from European countries and has to do with a critical debate (Schumann, 1989; Schünemann, Von Hirsch, Jareborg, 1998; Kalous, 2000; Neuss, 2001) given that punishment is not aimed at people but to society as a whole and in particular to the conservation of the regulatory system (Hörnle, Von Hirsch, 1995). This system has a two-dimensional nature. A first dimension of a communicative nature consists in the function of reaffirming and demonstrating the validity and inviolability of the law despite the infringement of the crime which in reality appears as marginalized and irrelevant while the juridical values of the community are reconfirmed as unprejudiced. The crime as an infringement of the law and the penalty as a reaffirmation of the validity of the same emerge as expressions of social communicative meaning. The second dimension is of a cognitive nature and connotes the objective of strengthening the sense of trust of the associates in the validity of the law.

The general positive prevention as an explanatory model of penal intervention seems to underline the expansive dimension of the crime and punishment. The crime does not resolve itself

into a private matter between the victim and the offender but involves the whole community as the penal sanction does not only target the perpetrator of the crime but serves to restore and strengthen the relationship between associates and the civil community. The symbolic communicative dimension of punishment understood as a response to an event that is not evaluated in the legal system as an external fact and its material consequences are presented as statements endowed with meaning. The penalty must be taken seriously by the majority of the associates and have a restorative effect on the violated order which performs a function of reinvigorating trust in the legal system and remains a communication addressed regardless of the way the community feels. It is a dependent variable of the type of marginal and normative conception, oriented towards understanding the function of punishment in a communicative sense, fundamental to cognitive needs (Feijò, Sànchez, 2007; Werkmeister, 2015)[28].

The risk of legitimizing this position in international criminal law is reminiscent of the evaluation outcomes on the historical-

[28]"(...) in punishment the symbolic reaction to the infringement of the rules, but the latter are not understood in an abstract sense, but as concrete expectations linked to interpersonal relationships or organizational arrangements capable of guaranteeing general freedom as a social reality (...) in this way the sanction is also characterized by the precisely preventive dynamic in view of maintaining the necessary conditions of collective trust in the validity of the rules and in their factual capacity to direct the life of society (...) in particular the criminal sanction should serve to prevent the disintegration of the democratic and social rule of law in its current concrete configuration or its evolution towards different forms of social reality, through counterfactual stabilization of the essential, necessary and indispensable norms of collective living (...)".

political level which depend on the general evaluation prevention (Heller, Mègret, Nouwen, Ohlin, Robinson, 2020), in the symbolic perspective and in the psychosocial perspective which precludes any critical capacity with respect to the system being confirmed (Jescheck, 1952; Roggemann, 1998). The meaning seems to recognize that the afflictive sanction par excellence is the strong response to the attacks on fundamental human rights. The sanction as a reaffirmation of one's assumptions in the face of the loss of validity as a result of the commission of serious crimes (Hassemer, 1997). The penalty thus affirms the function of confirmation or symbolic restoration of the humanitarian conscience in the sense of its own inviolability, of reaffirmation of the fundamental norms of strong civilizations on an axiological level and of a conflict of state power where the meaning of human values in the face of infractions is presented as a motivation in the pronouncements of international jurisprudence to the generic affirmations that respect the foundation of trust and respect for the development of an international justice system as the rational basis of the full-blown war without thoughts of impunity[29]. A symbolic function of a theutological nature that is oriented towards a self-affirmation of international criminal law (Werle, 1997).

Faced with phenomena of macro-criminality, the system of

[29]ICTY, Prosecutor v. Kupreškić, Trial Chamber, Judgment, 15 May 1988.

eventualities of a general preventive effect of a negative and positive type cannot be amenable to the empirical verification of a sporadic application of rules of international criminal law (Möller, 2003). A culture of human rights protection which is seen in practice through the ad hoc courts as a basis for building the system of the ICC which represents a long cultural process which has found forms of justice that are questionable and inspired by national levels where they appear as generic evaluations that have to do with the function of punishment in the international arena (Jacobs, 1998).

An international criminal justice as a justice that seeks to consolidate democracy and concerns individual subjects with respect to facts ascertained in the procedural terms established by law has its own consequences (Heller, Mègret, Nouwen, Ohlin, Robinson, 2020). First of all the removal of oblivion and the publicity of the facts and their authors which hinder the often difficult process of transition from dictatorship anarchy to democracy as a claim that every penal intervention contributes to preventing the repetition of certain criminogenic paradigms, i.e. the epidemiology of terror where totalitarian systems refer to the chronic impunity of other totalitarian historical experiences and of the crimes perpetrated where through propaganda systems for the perpetration of violence against enemies it appears plethoric and to the extent that it projects this request

onto a global context (Möller, 2003; Holà, Van Wijk, 2021).

The general positive prevention takes the form of respect for the consummation and organized perpetration of serious crimes through systems of dismantling of organizational structures, lack of financial means, etc. where today the ICC lacks coercive tools to obtain the collaboration of individual states (Werle, 1997; Akhavan, 2001; Weisser, 2008). The springtime of a new juridical awareness, of a palingenetic conversion on a worldwide level is no longer symbolic and/or to be hypothesized.

International humanitarian law certainly does not have the tools to affirm the will of those governments that are indifferent to the protection of human rights without the cooperation of individual States (Liakopoulos, 2019b). The function of general positive prevention assigns to the penalty the difficult task of reaffirming the values of an existing order as a desired system of values to be built. In this sense it can be expected that a titular State has the monopoly of the coercion of a system of expectations endowed with normative significance with respect to the jurisdiction of the ICC. Regulatory expectations that reduce to a statement of principle of the verification of the systematic and normal violation, logic of the same contexts. The international legal system has its own obligation and especially the international criminal law to legitimize a stabilization of the instrument of criminal sanction. It is essential that the rules of

this system are recognized as binding and according to national laws (Von Förster, 1981; Gòmez-Jara Dìez, 2005). Given that the system of international criminal law seems "(…) connected to situations of state of exception and received as an absolute exception (…)" (Möller, 2003)[30].

A difficult discussion arises between the norm and the state of exception due to the complex question of the legitimacy of the penalty which excludes the possibility of assuming the general preventive character in a positive sense as a qualification of penal intervention (Van Der Wilt, 2016). The general positive prevention seems inadequate in terms of its effects and the reasons that invalidate any consequentialist perspective (Dana, 2014) to penal intervention *iure gentium* seem symbolic of the same theory *tout court* inapplicable to configuring fundamental rights on a global scale with respect to what is foreseen by the StICC relating to the validity of expectations and the verification of the normality and conformity of a punitive system against crimes against humanity (Bassiouni, 2011).

The penalty within this perspective is not a *mere fictio* given that

[30]According to the author: "(...) the way of feeling of the community is usually more inclined to acknowledge the ethical-juridical negative value of atrocities connected in everyday life rather than those that characterize megadimensional phenomena of system macro-criminality, with respect to which the attitude is often even one of indifference: almost as if with respect to the state of exception it is instinctive to suspend ethical judgment, due to the difficulty of understanding the events in their real significance (...) this valutative uncertainty cannot fail to be reflected also in relation to international criminal law as autonomous legal system, oriented towards a selective prosecution of a few crimes committed in exceptional contexts (...)".

it would be assigned the task of transforming dimensional atrocities that cannot be grasped in their exceptional scope into crimes in the classic sense, that is, of facts that are not such into ordinary crimes at a national level. It is noted that in the system of a positive preventive general position an aspirational culture of rhetorical declamations of the binding principle is recognized as a *jus cogens* right, an untouchable right and a right of education of the community towards these types of crimes of a world community by now sensitized to the individuals and criticism of the mass conformism of a widespread ethical awareness (Möller, 2003). A dynamic strengthening of critical awareness of systemic macrocriminality of an international criminal process (Heller, Mègret, Nouwen, Ohlin, Robinson, 2020) which favors the stigmatization of individual behaviors towards the demonstration of a worldwide existence of normative values, of the diffusion of knowledge among the community.

Negative special prevention: Intimidation or neutralization?

When we speak of special negative prevention we mean respect where the penalty is instrumental as well as we refer to the model of penal intervention (Van Der Wilt, 2016). Respect for the instrumental punishment includes individual intimidation as an articulation of the penal law of prevention, i.e. a peculiar

system of the phenomena of perpetration of mass crimes or macro-criminality which comes from power apparatuses conditioned by systems of historical-social macro-situation of conflict as well as by the risk of recurrence which should be excluded once this has ceased, as well as the possibility of recurrence (Jäger, 1995; Möller, 2003).

The sector of special negative prevention is that of harmlessness where the penalty assumes a particular value in relation to the instrument of protection of society from the danger of committing serious crimes through the neutralization of the condemned person as a dangerous subject for the community. Also in this case of following the subordinate subjects the danger remains as a historical situation since the leaders and the related elite who are captured and put on trial are overcome as a conflict and their function is defeated (Arendt, 2005). The conflictual context cannot be overcome and the persistence of the criminal system is often linked to survival at the top of the leaders and keeping power in their hands. The stigmatization and neutralization could assume an essential function in order to cut off the root of the system itself. The ICC has not included a police apparatus on which the outcome of investigations and the delivery of those responsible depend.

A special negative preventive function as regards the leaders of the system occurs when they have completely moved away from

power and continue to constitute a danger as happens in the case of dictatorial regimes that pass to democracy where the maintenance of command of the armed forces it is simply formal and they shape situations where justice becomes slow until it resumes its normal course and the community begins a serious process of internal, national reconciliation (Möller, 2003).

Symbolically, the phenomenon of identifying the criminal system with the subject or subjects who created or guided it (in this case the special negative preventive function) has a clearly symbolic meaning which refers to syllogisms that can be translated into the criminal law of the enemy (*hostis iudicatio*).

It serves the neutralization of the danger connected to the existence of the criminal since it involves the forfeiture of citizenship and one's qualification as a consequence of such connotation of stateless person, as a public enemy in a territory subject to the jurisdiction of the ICC according to art. 12 StICC (Ambos, 2022a), with the exclusion of the granting of hospitality, or to the right of asylum which also in this case the ICC moves in a complementary way (Manikis, 2022). The loss of citizenship or ostracism *urbi et orbi* are considered in this case as voluntary. We are talking about the criminal law of the enemy, where the offender is not the subject of a dialogic procedure but the target of a fight against evil where the community defends itself with any suitable means.

StICC and resocialization. Margins of the penalty system

The discourse of resocialization which contains the re-education, reintegration, rehabilitation and, social treatment of the convicted person are pre-established objectives by the StICC[31] as well as by the UN High Commissioner for Human Rights (Kelder, Barbora Holà, Van Wijk, 2014). Of course, the subject of individual intimidation and the risk of recidivism remain open:

"(...) the reintegration of internal relations within the community brought about by the transition has an automatic re-socializing effect (...) at least in relation to that great mass of subjects who have committed serious crimes only as material executors of orders or low-skilled elements (…)" (Möller, 2003)[32].

The marginal spirit of the StICC is oriented towards the re-educational perspective of the sentence due to the fear of the precipitated state of exception and the exceptional conditions

[31]Prosecutor v. Dražen Erdemovič, Indictment, IT-96-22-T, Office of the Prosecutor, 22 May 1996, par. 30.

[32]According to the author: "(…) the resocializable aspect could be that of the psychic weakness of the subject who is easy to be manipulated or to undergo the indoctrination of the authority in a totally uncritical way; but on this point the legitimacy of resocialization measures is doubtful, which should necessarily address the psychic constitution of the offender, his way of being, his de facto "Gesinnung" in order to manipulate it in turn by modifying its programming in some way by disinfesting it from totalitarian ideological waste, etc. (…) with respect to top management, i.e. leaders, senior managers, military leaders, first-degree officials: but with respect to these, the objective of re-socialisation would be neither desirable (having already given evidence of being inclined to exploit in a criminal sense society rather than to readapt to its values, and therefore to intimately reject a free society) or just (given that with their actions contrary to the essential foundations of human society they have lost the right to integration and recovery) (…)".

that the facts and the subjective qualities of the condemned have verified which justify the suspension of re-socializing expectations (Arendt, 2005).

In this spirit, art. 110 StICC (Ambos, 2022a) is the only hypothesis of reduction of the sentence subject to strictly predefined requirements and not to a prognosis on the social reintegration of the convict in the event that:

"(...) 1. the person has served at least two thirds of the sentence (or twenty five years in case of life imprisonment); 2. he has expressed a willingness to cooperate with the ICC in the investigation and during the proceedings; voluntarily facilitated the execution of decisions and orders of the Court. In other cases (...) once the assumptions have been verified, the reduction of sentence then becomes irreversible, regardless of the subsequent conduct of the offender (...)" (Schabas, 2002).

A re-educational function also refers in par. 4, lett. c), that it affirms that:

"(...) the sentence may also be reduced for other factors envisaged in the procedural rules and the admissibility of evidence which attest not an evident change in circumstances, with noteworthy consequences and such as to justify the reduction of the sentence (…)" (Ambos, 2022a).

Also note art. 223 of the Rules where it is stated that the Judge: "(...) with regard to the request for sentence reduction, must also take into account the prospect of re-socialization and successful resettlement of the sentenced person (...)" (Ambos, 2022a)[33].

The same line of thought also refers to art. 223, lett. a) of the Rules, where:

"(...) assigns autonomous relevance for the purpose of reducing the sentence to the conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime of her (...)" (Ambos, 2022a).

Therefore, we speak of reduction of the sentence where on the one hand we have a utilitarian line and on the other the re-educational imprint in the sense that the residual and current re-

[33] Art. 110, par. 4 StICC.

socialization are rules and margins that enter into the application of the pre-established Rules of the ICC (Werle, Zimmermann, 2019).

We already recall from the ICTY the sentence of Erdemović case where arguments and positions of prevention, retribution, stigmatization of the sentence are heard as well as dominant amendments of the repressive instance as well as the exclusion of re-education. Non-random arguments that have allowed the reduction to a minimum and the re-educational connotation of the sentence which also unknowingly constitutes the state of exception and the exceptional conditions that have verified the facts and the subjective qualities of the condemned which justify the suspension and the reduction of the expectations of a nature social.

In reverse: Symbolic criminal and bad nature

Symbolic penalties have a severe and characterizing nature as "anomalous" given the experience of the jurisprudence of the ad hoc tribunals and as transversal with respect to the notion of the stigmatization of the criminal, the indignation and reprobation of the international community (Feinberg, 1994). The penalty has the function of communicating the censure and condemnation of the offender (Von Hirsch, 1993). This prerogative is identified with the reprobation of the offense. The expression of censure is

a useful tool to change the conduct of the offender and to distract others from the commission of the crime (Szoke-Burke, 2012). In this case, not punishing the violation of fundamental human rights means devaluing the validity of the same human rights (Silva Sànchez, 1992).

The only absoluteness remains on the communicative level of limiting oneself to a symbolic expression of social disapproval, such as a manifestation of solidarity with the victims, a symbolism as remarkable as to the public space and the international community that one must resort to an afflictive penalty. In this case, as Duff points out:

> "(…) from the existing gap between "power" and "duty", in the sense that this communication can also take place through a particularly severe penalty, but it is not clear why it should be like this (…) the reason can only be of the consequentialist type, i.e. a severe penalty that will be more dissuasive in a purely symbolic affirmation (with the classic objections-risk of exploiting the individual for "external" criminal policy needs-to which the model of deterrence is exposed) (…)" (Duff, 2001).

The profile of the psychological effects on the international community is accompanied by the fight against impunity and the commission of such crimes. Creating trust and respect in the international criminal justice system means natural effects of the penal sanction as collateral, i.e. desirable consequences and not expectations inherent in the concrete purpose of the penal intervention. Already the StICC does not contemplate any explicit indication with regard to the function assigned to the penalty (Schabas, 2004). The absence of a position on the issue would have neutralized or circumscribed the tendency towards a

symbolic use of the penal coercive power which is oriented towards the satisfaction of expectations and in international public opinion.

The penalty in the case of humanitarian interventions

Up to now we have talked about retributive, consequentialist and preventive perspectives. The punishment of crimes against humanity occurs only after victory and as justice for the victor and the hegemonic forces. Any hope of a peaceful transition where the prospect of being subjected to trial and criminal conviction is a determining reason for the atrocities and for the purpose of doing everything to avoid it. The fight against crime as a response that we already know from the history of the Second World War and from the Nuremberg tribunals (Sander, 2021), ad hoc tribunals and at most with the ICC, which have shown that the need does not go back. The wounds are still open and the adoption of more effective preventive means, even if not of a criminal nature, such as: "(...) the permanent occupation of the territory and its rigorous and complex control (…)" (Gustafson, 1998).

The link between humanitarian penal intervention with a repressive and intimidating function (Pickard, 1997) and humanitarian war intervention is clarified to the extent that the penalty is assigned this type of function (Akhavan, 2001). The

utopian wishes and goals that can be assigned to penal and humanitarian intervention with expectations of international law appear as a naive aspiration to replace military humanitarian intervention with criminal jurisdictional intervention (Gallon, 2000). Confirmation of this qualification of the global penal sanction is found in the maintenance of the peace according to articles 41 and 42 of the Charter of the United Nations (Stein, Buttlar, Kotzur, 2017; Deyra, 2018; Evans, 2018; Orakhelashvili, 2018; Shaw, 2018; Crawford, 2019; Henriksen, 2019; Herdegen, 2019). A remarkable global reality that has changed its face over the years where the relocation of enemies, internal antagonistic organized groups radiate their operations within the borders of other States as we have seen with humanitarian interventions, crimes committed within a state sovereign who, due to their entity and symbolic dimension, affect the global community. The mutation of war does not affect the definition of the spheres of law.

The analogy with humanitarian intervention imposes on penal sanction a series of benefits that respect and strengthen the international order, an order that has always remained weak. Contribute to the building of a global system capable of preventing conflicts on a regional and global scale. The maintenance of international peace in areas that have been violated opens up the desire for justice that afflicts a society full

of hatred and negative feelings (Roggemann, 1998).

World governance: atypical functions and models of *jus gentium*

We have now arrived at the moment to speak of a penalty that concerns international criminal justice with marginal functions of prevention. In reality completely atypical that respect the traditional schemes of the theory of punishment characterizing the complementary intervention of the ICC even before at the universal level of the jurisdictions (Stahn, 2018) of a global governance with extensive criminal phenomena as an object of cognition that have taken place.

The idea of an international criminal justice has also been taken into consideration with the StICC with respect to the historical process of affirmation of the peculiar prerogatives rooted in the need to establish a strong international criminal system and an ICC (Heller, Mègret, Nouwen, Ohlin, Robinson, 2020) ready to respond to violations of the legal values of the community of nations. Penal intervention cannot reside in state coercion. Object of judgment is to contribute to the end of world conflicts, to the stabilization and maintenance of peace of areas where international crimes have taken place (Heyder, 2006). The supremacy of international law over national legal systems acts

as a guarantee of human rights and different cultures by initiating a virtuous circuit that allows universal criminal justice to be carried out in these areas. The connection between the punishment of an individual for one of the crimes pre-established in the StICC and the peaceful coexistence of individuals through the superior jurisdiction, *inter partes*, seen as a jurisdiction with a permanent character reflects the imprescriptibility of the crimes subject to cognition as well as the impossibility of a definitive overcoming of the conflict that justice is not fully done and/or due to the death of those responsible. It becomes understandable how a naive over-evaluation of this characterization combined with an approach to the idea of military-type humanitarian penal intervention as a hypothesis of the existence of an international jurisdiction of real macro-functions such as that of the constitution of a global identity underlining the polemical nature of this type of justice and the non-assimilation to state criminal law.

For supporters of legal humanism, universalist expectations include the task of contributing to the construction of a global system capable of preventing conflicts and guaranteeing peace on a global level. A war-prevention utopianism was seen as a function of a mere indirect effect that likewise favors the outcome that orients historically important nations on international issues.

The instrument of integration of society is often referred to as a conciliatory peace-making perspective in the celebration of criminal trials which helps to favor internal stabilisation. There is no authentic peace without justice. It is difficult for populations traumatized by transepochal events to be able to conceal the difficulty of combining the creation of negotiating tables with the outcome of a criminal proceeding which legitimizes itself as immune from any form of political influence, impermeable to concrete instances and different from the procedural evidence of each evaluation of opportunities. Wide credit is attributed to the aim of integrating international criminal justice as a degree of proceedings celebrated and concluded by producing reliable documentation and personalizing purpose in the judicial assessment. This path can already be seen in the identification of the collective responsibility to build on ethnic, religious groups, etc. for mass violations of human rights (McGonigle Leyh, 2018) an international criminal jurisdiction.

The socio-pedagogical and cultural nature that we have talked about so far is based on the diffusion of the culture of human rights. The creation of a collective legal consciousness leads to the observance of human rights and the identification of individuals as belonging to the human race with a system of values protected in the global order (Damaška, 2008). The

general positive prevention in the context of *jus gentium* finds *ex novo* confirmation in the StICC Preamble (David, 2013) to the desire to guarantee a lasting respect for the application of international justice. The aim is to create an identity that values human rights towards the foundation of the victim recognition function in the sense of satisfying and offering an overcoming of the events and to give a louder voice to the StICC which begins to write history against impunity (Sander, 2021).

Punishment as a means of restoring peace

One of the purposes of punishment in international criminal justice (Heller, Mègret, Nouwen, Ohlin, Robinson, 2020) is the idea of re-establishing international peace and security as well as building a global society based on international rules such as a general peacemaking in a not very disguised way to a naive aspiration to replace military humanitarian intervention with criminal jurisdictional intervention (Besson, 2019; Combacau, Sur, 2019). Here we have a circumscribed perspective of a society face to face with the history of the past that fosters internal reconciliation and establishes a moral and legal order through the establishment of a culture of justice (special peacemaking). Also in this case the aim is the reconstruction of a civil society.

Already from the jurisprudence of the ad hoc tribunals, as also

from Nuremberg, the idea was the purposes that one considers the duty to assign a penal intervention *iure gentium* (Mohr, 1995) never prejudiced to a reconciliatory and correctly circumscribed expectation of a consequentialist type (Dana, 2014) in the sense of systemic prevention, oriented towards shaping community arrangements in order to avoid future situations of conflict. The reworking function of the past or of an institutionalized overcoming connected with one of the offshoots of the first ensures a documentation of the historical truth of the past and of the crimes committed.

The individual function in the exact and complete way of individual responsibility seen as the opening of a forum for victims who can be recognized for their tragic experience, i.e. as a voice that receives reparation that bears responsibility for the international community (Cohen, 2020). These are functions intersected and revisited teleologically unified by objectives of pacification and the civil reconstruction of societies. The idea of a cathartic dimension with collective effects of the humanitarian-inspired function of punishment in the international sphere contributes to the process of recovery and reconciliation with a view to deploying preventive effects against future conflicts. The restoration or rebuilding of the social fabric and of the legal and moral order is a true metamorphosis of the society determined by the criminogenic

structures of the system of the past with a conscious progressive action of consolidation of the fragile structure of the rule of law that has just been achieved. The penalty respects these profiles and favors the exercise of penal intervention.

A criminal trial opposed to crimes against humanity imposed from outside risks traumatizing populations and marks a serious social fabric that is jeopardized for peace processes by demolishing the fragile precondition balances (Hafner, Boon, Rübesame, Huston, 1999; Wedgood, 1999). The concrete infliction of punishment especially on political or ideological leaders in a conflictual context is seen as a sort of creating martyrs and provoking phenomena of violence.

Peacemaking is understood in the sense of a sort of complementary function as a fundamental principle of the global order capable of delegitimizing any motivated and reasonable instance that opposes it. The reasons of general and special prevention characterize the sentence inflicted by the ICC as an object of jurisdiction that risks lacerations (Stahn, 2018), of reopening outbreaks and transversal vendettas. An internal and regional conflict on a territory that needs conciliatory solutions or non-criminal mediation. The use of the peaceful order as a hermeneutical canon is a heuristic paradigm for the legitimate identification of axiological limits as we have already seen with the ad hoc tribunals and in some way with the

institutionalization of the StICC.

The general principle before the criminal political choices of international justice ends exponentially and awaits the jurisdiction of the ICC to the point of questioning the legal taxation as a dynamic of the process before the ICC (Nollez Goldbach, 2018). Dynamism of the provisions of the *motu proprio* criminal action through the Prosecutor and/or on referral of the Security Council of the UN (Vaid, 2013; Liakopoulos, 2020a; Trahan, 2020) seems to disavow this path of reconstruction. The only body that safeguards and guarantees peace is the ICC itself. An international criminal justice system (Heller, Mègret, Nouwen, Ohlin, Robinson, 2020) can arise and transform the monopoly of penal coercion where, with the help of the principle of complementarity, it enjoys adherence and sympathy at an international level as well as the possibility of indirectly influencing the reconstruction of the facts. Penal intervention is transformed into an instrument of affirmation of a faction and/or as revenge of the victors. The selective propensity of international justice seems ill-suited and unfit for the goal of reconciliation unless it is understood as the normalization of the part of the ruling class that has proved victorious. The story of the *vae victis* continues and shows from origin little chances of effective, lasting and continuous reconciliation (Joyce, 2004).

The truth of criminal jurisdiction: the sentence as an effect of the historical memory of the past

An element of international criminal justice (Heller, Mègret, Nouwen, Ohlin, Robinson, 2020) is the truth of historical events and the reconstruction of the originating crime to the production of a broad and detailed documentation of the atrocities which guarantee the authority of the court and above all the procedural system. As we can see from the advertising of discovery, the production of documents is facilitated by the presence of the defendants, the participation of the victims and access to the probative material and, the activity of the organizations or groups during the time (Derham, Derham, 2010; Bavli, 2015).

The aim is to avoid denialism as well as the tendency of supporters of tyrannical regimes to challenge the roots of historical fact and systematic human rights violations through acknowledgment of the commission of crimes, the responsibility of individuals and the sufferings of the victims. Saving the integrity of memory through the criminal process reconstructs the past and builds the current social community with a view to reconciling future conflicts (Damaška, 2008). The expectation of the victims arises from the aspiration of offering more awareness rather than knowledge based on the consideration that the public recognition of the truth of events and of the victims legitimizes their expectations thus laying valid foundations for

the possible reconstruction of lasting success (Nsereko, 2010). These supplementary *lato sensu* functions regulate the conduct of the trial before the imposition of the sentence and the international criminal jurisdiction aimed at society with a view to neutralizing pathological situations of a criminogenic nature. Within this spirit, art. 54, par. 1 StICC assigns the Prosecutor to determine the truth and to extend the investigation to all the facts and probative evidence that may be useful (Liakopoulos, 2019c).

The intentions expressed by the function of truth replace the historical judgment which is already complex and does not limit the reformability of the judged. The truth of a criminal trial knows peculiar limitations linked to needs that guarantee the protection of human rights and above all of the accused. Let the *res iudicata* be qualified in historical questions as a true and proper absurdity. The ascertainment of the truth in the context of the trial is circumscribed within the confines of the evidence that can be produced on the basis of legal relevance and the examination which does not allow for an infinite regress in the reconstruction of the chain of conflicting causes which gave rise to the crimes (Damaška, 2008)[34]. Prosecution represents an institutionalized form of social conduct oriented towards ascertaining guilt within defined legal contexts based on

[34]The author affirms: "(...) the work of historians is not conditioned either in terms of speed by time limits to be respected or in terms of evidence by limits to the allegation of the supporting arguments (...)".

evidence which are admissible in particular forums which emerge a process of truth, *rectius* of truths in a certain situation which becomes an indirect or incidental consequence (Mcgoldrick, 2004). The approximation to historical truth constitutes other paracriminal models of social control such as, for example, truth and reconciliation commissions in which a leading role is assumed by factors such as confessions, narrations of events, participation of victims, granting of amnesties. We are talking about models where compatibility with international criminal law is subject to weighting with regard to the StICC even in its own silence of the same could find in the principle of complementarity the possibility of deferral of the Security Council of the UN, in the discretionary exercise of the action prosecution by the public prosecutor and in favor of the interests of justice (art. 53)

Overcoming the past, reworking and future of the punishment

The overcoming and reworking of the past is based on the transition theory (Teitel, 2000; Gissel, 2022) which stops at certain historical situations of transformation as a vehicle for ascertaining criminal responsibilities inspired by the German theory of *Vergangenheitsbewältigung* (Claußen, 1989), i.e. systemic crime born under the Nazi regime in the past (Jakobs,

1992; Alexy, 1993; Pawlik, 1994a; Brugger, 1996; Hillenkamp, 1996; Naucke, 1996; Schlink, 1996; Dreier, 1997; Frisch, 1999; Wilkins, 2001; Kawaguchi, 2002; Günther, 2008; Parmentier, Weitekamp, 2013). The passage from one regime to another, i.e. from the state of war to that of peace viewed as the most pertinent qualification (Steinitz, 2005) due to the evident inadequacy of the concept of past history remains the only object of retrospective criminal judgment which respects the specific of the massive commission of core crimes (Ambos et al. 2022b) and is not able to connote the devastating effects of macrocriminality as models of criminal intervention other than state coercion (Möller, 2003).

The transitional justice has as primary typical and critical phenomenon that indicated by the term “lustration” (Cohen, 1995; Kritz, 1995; Crocker, 2001; Widner, 2001; Daly, 2001-2002; Roche, 2005; Rohtarriaza, Mariezcurrena, 2006; Hafner, King, 2007; Clamp, Doak, 2012; Doak, O'Mahony, 2012; Palmer, Clark, Gran-Ville, 2012; Clamp, 2013; Daly, 2016; Nathan, 2020; Miller, 2021). The purges and the exclusion from the enjoyment of civil and political rights or the banning from positions of public importance and the limitations on entry into the leadership of the new structures placed on people involved with the old regimes, secret police and their informants, etc. are some of the phenomena of transitional justice. Operations that

do not take into consideration the normality of the system of behaviors where the perpetrators are subject to proscription (Huyse, 1995). A purge-type situation that unconditionally overcomes remembrance and silence, both formalized as the foundation of the new constitutional arrangement (Nathan, 2020).

Transitional justice takes into account various critical and surmountable profiles (Rohtarriaza, Mariezcurrena, 2006). A procedural type judgment that damages a series of historical investigations by offering to the theater of atrocities as provided for by art. 5 StICC (Liakopoulos, 2019c; Ambos, 2022a) an arduous claim of transitional justice, especially the legal norms in which it is rooted and can correct illiberal powers or depoliticize the nature and causes of mass violence (Drumbl, 2005)[35].

The reworking of the past is normal and should be taken as a parameter of the expectations and principles of the new social model based on the mentality of the winners. The relationship between offenders and victims remains difficult and the identification of positions are based on the ideal of justice as a winning result. It is a transition that did not take place

[35]"(…) ICTY has issued judgments that cite retribution and general deterrence as "equally important", judgments that cite retribution as the "primary objective" and deterrence as a "further hope", warning deterrence "should not be given undue prominence", and judgments that flatly state "deterrence is probably the most important factor in the assessment of appropriate sentences" (…)".

peacefully but spontaneously following an external humanitarian intervention in which the rate of anomy that characterizes the transformation manifests itself in an escalation of violence and transversal vendettas (Aukermann, 2002).

The historical past and its own rethinking and overcoming seems to presuppose the renunciation of a criminal judgment based on the facts (Schabas, 2016). The historical, aseptic restoration of the past which respects the massive phenomena of crime has been valued as a model of return to normality above all by historians and not by jurists, i.e. as a mechanism of internal peace which allows the victims to overcome the traumas and injustices of the past. The aforementioned *probatio diabolica* and the effectiveness of the contribution to peace and reconciliation offer to international penal intervention (Heller, Mègret, Nouwen, Ohlin, Robinson, 2020) the possibility of developing and preventing ad hoc strategies (Tallgren, 2002). The jurisdiction of a global criminal law easily has opposite effects and further wounds for society and the victims. The re-elaboration of the past is oriented towards a total or partial overcoming of the trauma connected to the object of analysis which leads to expectations of historical justice on the part of the victims, requiring definitive final judgments but also public, secular understanding (Ashworth, Ashworth, 2012) given that every sentence, every definitive sentence also has a pathological

legacy of phenomena of massive collective violence with historical wounds of macro-criminality systems that cannot be resolved by processes culminating in a *res iudicata* (Richard, 1997). The commission of crimes envisaged by the StICC and the identification of the perpetrators marks on the one hand the proportions of certain historical phenomena which calls for "the penal selection" (Nicolas, 2012) of abstract criminal cases and on the other hand the subsumption of concrete facts towards the incriminating norms that provide for them (Odersky, 1992). The history and the emotional dimensions of the past are the tradition and the development of the facts, where the penal judgment runs the risk of being reduced to a:

"(...) crude instrument of power of the party or of the winning ideology, without however being able to be understood by the community (…). Thus it seems extremely difficult to configure the reworking of the past as a function of the *iuris gentium* penalty (…)" (Odersky, 1992).

Decollectivization of the judgment of guilt as certainty of individual responsibility

The individual function of punishment mediates the offender with an important lesson for Western legal civilization. The need to avoid liability of a collective nature based on ethnic, religious, cultural groups, etc. for violations of human rights it renders the penalty in a position held within a hierarchical, personalized organization which assumes a meaning of respect to the main function of it. Of course it differs from the social

character and what we have discussed above of special prevention which has a peculiar autonomous value of the same nature as the penalty. A penalty that affects individuals respects and at the same time shows the macro-criminality of a system that takes on meaning where the individual offender assumes his own and specific responsibility towards the victims in the international community.

International criminal justice as impartial justice and as an end to the conflicts of the justice of the masters of total victory in the world arena remains extraneous to the verified events and marked by the principle of complementarity connectable to the idea of identifying those responsible on the criminal juridical level. A dialectical idea that respects collective blame and notes the history of the past as a workable model of justice towards the implementation of the principle of personal responsibility.

The evolution of international criminal justice lies in the path of the dual handling of criminal responsibility (Heller, Mègret, Nouwen, Ohlin, Robinson, 2020). On the one hand, we talk about universal transposition of the accession of an increased number of adhering States as members of the StICC in the sense that they seek to punish the crime prosecuted by the ICC (Heinze, Dittrich, 2021; Tchinda Kenfo, Zozime Tamekamta, 2022), such as genocide, unjustified aggression or aggression for personal or state purposes, rape, massive violence against

certain groups that belong to a world community of peoples, without prejudice to the prerogative in the principle of complementarity. Regardless of the origin of the accused, the perpetration of the crime is activated to proceed judicially in a manner and in the name of protection for the national interest and the prosecution of crimes, as a representative of an international, global form of justice based on an evolutionary law, transformed, in continuous change that responds to the needs of society and above all faithful to the spirit of StICC.

On the other hand, the fact Judged respects the natural person as subject of the charge of criminal liability. In other words, the globalization of responsibility includes forms of publicity and the identification of the principle of legal civilization of personal responsibility that needs to be reflected upon in order to understand the real function of punishment in our times. Individual responsibility ends up revealing the meaning and scope of the atrocities subject to judgment to be inadequate. This is a neo-abolitionist and skeptical position that is been used through the notion of the diffusivity of guilt and the collectivity of tragedy. This means that crimes against humanity (Bassiouni, 2011; Morales, 2020) are never the creation of individual delinquent subjects but emerge as manifestations of complex systems, where they are all responsible by calling to answer not to a scapegoat, subjecting an individual at the trial

instrumentally revealing the recognition of the victims' expectations and the publicity of the facts (Zolo, 2004; Krever, 2013). It is also true that the international criminal jurisdiction encounters limits and enormous difficulties in an impartial judgment on core crimes (Ambos et al., 2022b) which reverberate in deliberately or less radical areas of a delegitimization of justice itself, as a clear force of the justice of the victors oriented to a blatant selection of the responsibilities of its bearers; and simultaneously with an exemplary model of condemnations as the implementation of imperialist programs by the great victorious powers which continue to exempt themselves from this judgment. The workaround is restorative justice (Krever, 2013)

Some structural deficits of the international criminal justice system gives voice to a process of downsizing (Gless, 2021) of momentary enthusiasms for realized utopias that evade factual realities, i.e. the profound and dangerous naivety of the aspiration for a global human justice. The question arises from crimes committed by individuals in the context of criminal macro-apparatus where their dimensions coincide with those of the entire State to which they belong and with its fundamental sectors. These types of atrocities are usually not made the object of judgment within the systems committed, positively guaranteeing peace processes in times of transition and

suggesting the prospect of an international response which assumes the meaning of an awareness on the part of the international community (Gissel, 2022), that is an exceptional nature of the contexts that occur when taking charge of the protection of those who obtain massive and liable reiterations within their own internal borders. An arbitrary violence where the assumptions of the model of international criminal jurisdiction established by the StICC can be criticized under various profiles. Or maybe changes are needed in the near future?

The restorative penalty: The victims in *jus gentium* criminal justice

Victims in international criminal justice have a dual role. On the one hand they need the return of their possessions, i.e. healing from the wounds produced (Greco, 2007; Findlay, 2013) even if their participation in the ICC remains limited to non-existent. We recall art. 65, par. 4 StICC (Ambos, 2022a)[36] regarding the limits of a right to trial (Gless, 2021). The right to intervene

[36]Chamber must examine whether the accused understands "the elements of the crime or crimes to which he has pleaded guilty to ensure that his understanding of the requirements of the crime reflects his actual conduct and participation as well as his state of mind or intent when he committed the crime" (Prosecutor v. M. Nikolić (Case No. IT-02-60/1), ICTY T. Ch., 2 December 2003, para. 12). Where the accused faces alternative charges, he must comprehend "the nature and distinction between the alternative charges and the consequences of pleading guilty to one rather than the other (...)" (Prosecutor v. Erdemović (Case No. IT-96-22), ICTY A. Ch., 7 October 1997, separate opinion of Judge McDonald and Judge Vohrah), para. 14).

according to art. 68 StICC (Palassis, 1993; Silva Sànchez, 2000; Garkawe, 2003; Haslam, 2004; Henzelin, Heiskamen, Mettraux, 2006; Mclaughlin, 2007; Wemmers, 2009; Garbett, 2017) is nothing other than the right to special protection for the risks involved in an intervention participation, as secondary victimization. Secondly, not being able to appear as a civil party, they obtain compensation of a compensatory nature for the damages suffered, i.e. as forms of financial reparation according to art. 75 StICC (Gil Candìa, 2020; Ambos, 2022a).

However, the problem is the channeling of the victims' desire for vengeance and penal coercion regardless of state forms. The punishment of gross violations creates incurable lacerations within the community where prevention based on rationalization rebuilds a social fabric that becomes an indispensable element for the purposes of civilized living. In the StICC the victim does not have such an individual character and as a subject to be protected but rather as an overall element where the roots of the conflict and the atrocities committed are the object of indefinable incrimination both on the historical level and on the moment of claims to particular identities which see the ascribed selection of enemies.

The victims also undergo further victimization phenomena since they become tools that support the reasons in a social environment aware of a tragic experience and in a function of

legitimization and defense of interests that have nothing to do with those of the same (Safferling, 2003). The indirect consequence of the provisions of the StICC is that the victims find themselves in the midst of a confrontation with a large number of well-organized defendants, deprived of means of protection and substantially powerless in the face of the powers at stake that they must suffer (Boyle, 2006; Mclaughlin, 2007; Killean, Moffett, 2017). Art. 65 of the Rules of Procedure and Evidence is characteristic of the role of victims and their own needs which differs from ad hoc courts. Victims represent a primary and legitimizing function of the ICC institution itself (Pena, Carayon, 2013). The adequacy of the entire system guarantees the expectations of a model guided by art. 44 StICC (Ambos, 2022a) as well as the related guarantee fund for victims and their families according to art. 79 StICC as well as procedural participation for victims (Haffke, 2003; Guhr, 2008; Lagon, Arend, 2014; Kochhar, Hieramente, 2016).

Symbolizing punishment in international criminal justice

The penalty as a result of the written documentation which makes it definitively *res in judicata* often also has a character that is not so much practical for the expectations of international society but also symbolic, communicative according to the type of sentence that has been taken into consideration by the global

community (Nemitz, 2001). International criminal justice seems to be marked by a paradox, namely the need for an afflitive sanction.

The communication of pain and not the infliction is conceived by the social system as relevant (Gòmez-Jara Dìez, 2005; Blumenson, 2006; Wegner, 2015). In modern societies afflictivity plays an ever lesser role for punishment and manifests the progressive dismissal of corporal sanctions, the expansion of interdictory sanctions as well as the tendency towards new forms of intervention, i.e. restorative justice that may rule out the size of psychological effects. Modern society increases the success of public communication oriented to any cognitive profile to highlight those elements of a specific system conceived as indications of neither positive nor negative sign as a justification of the legitimacy of pain (Fuller, 1958).

The nexus of proportionality between the social gravity of the facts and the afflictiveness in terms of communication is appeared self-evident in the face of atrocious crimes such as those against humanity (Feijò Sànchez, 2007; Werkmeister, 2015). The pain is not justified and it is noted on a descriptive level. No rigorous and normative approaches are able to offer such a justification and such conceptions shy away from a not intra-systemic critical perspective (Weil, 1993). The cognitive guarantee of punishment allows for such a transition: from

afflictiveness to the expectations of community safety and of trust of its members in the concrete effectiveness of fundamental rights. A position that makes us think from scratch the logical system of special negative prevention in the face of situations in which those responsible for crimes against humanity (Morales, 2020) can pose a danger to their communities and for the global world.

We are moving towards an expensive international apparatus which makes the application of the law universal and respects the typical functions as consequences of an interpretative attitude which retraces the international justice of the traditional theories of punishment in the state sphere. The penalty such appears stochastic, assigned to the purposes of the Preamble of the StICC (David, 2013) and oriented towards the idea of contributing to the pacification of the search for historical truth, of the specific function towards humanity, of the prevention of the historical conditions that have originated the atrocities. There is talk of an international criminal justice which is a symbolic contribution of punishment. And the question is: What is the real reason for the entire international criminal system?

Legitimation of international criminal justice, function of the "world" penalty, mandatory criminal coercion and assimilation of humanitarian intervention

So far we have outlined some notions and theories in international criminal justice that outline and prompt the experimentation of other possibilities. A system at the universal level of the contemporary world intended for retributive justice with a highly symbolic connotation (Hampton, 1998; Johnstone, Van Bess, 2013) which offers relief to the victim, does not forget the past and history, reinforces social values and educates present and future generations (Bassiouni, 2006).

Within this spirit we recall the existence of an international community that needs to consider and establish the minimum structural foundations starting from neo-Kantian theories such as that of M. Köhler (Köhler, 1986). These are not enthusiastic positions in the face of the current situation of international criminal law, despite the establishment of the StICC, given that it referred to the lack of shared principles of international and criminal law to give life to a "universal *wirklich Rechtsmachtvereinigung"* (Köhler, 1986). The argument was based on the pretextual extension of a redimensioning that disavows the principle of sovereignty that characterizes international law due to the nature of the good and as a defense from which it was constituted. The *jus gentium* criminal includes a legal relationship between the person and the international community (Köhler, 1986) since it includes the most serious facts which:

"(…) concern the international community understood as a totality (…) a

community conceived without particular juridical assets, prerogatives or institutions, but rather with complex fundamental norms (precisely those of the *Völkerstrafrecht*) whose infringement, carried out with the commission of international crimes, constituting an offense for all peoples and States ("categorical universality") (…)" (Köhler, 2003).

The punitive claim can be:

"(…) activated against the culprits and the particular will of a State, with the possibility of abolishing international immunities and territorial sovereignty. Precisely because these are crimes that affect the legal subjectivity of peoples, international relationality as such (Köhler, 2013)[37] and their perpetrators must be considered prosecutable and punishable regardless of their citizenship and even against the contrary will of the State of belonging (…) the universal nature of the juridical asset protected by the incriminations of international criminal law, i.e., the legal personality of peoples and States (*die Rechtspersonalität der Völker und der Staaten*), would justify the overcoming of the prerogatives proper to state sovereignty and undermine the relationship legal citizen/single state (…) this approach should fall under the principle of universality (*Weltrechtsgrundsatz*) towards those crimes in which the denial is expressed, committed through a guilty act, of the constitutional capacity and at the same time of international criminal law, therefore of a fundamental condition of the autonomy of constitutional law within a community (people) or a State (…) properly, it will not be any inhuman act or act characterized by atrocities that will assume importance (not even serious war crimes or human rights violations committed within individual States should be a matter of international criminal law), but only crimes against humanity in universal sense: genocide and war of annihilation, enslavement or destruction of ethnic groups (…)" (Köhler, 2013).

According to our opinion and by Köhler's positions, it is the intelligibility with regard to the crime of genocide that represents an aggression against all peoples. It is not a form of discrimination against members of a certain group, a race, a religious denomination but a planning annihilation. It is necessary that the relationship is harmed by the law of nations. The universality of the protected good instead is not depreciated

[37]"(...)universale Menscheitsverbrechen ist zu bestimmnen als eine grandsätliche Negation innerer Rechtsverfasstheit, wodurch zugleich die Völkerrechtssubjektivität der betrofffenen verletzt wird (…)".

but stopped on the fact that the aggression is directed against an ethnic group, a community, etc. The subjectivity of *jus gentium* constitutes such a representative symbol of the totality of humanity.

The injuries to the international juridical relationship express an offense to all peoples and above all to the integration of the law of nations as a repression due to political reasons, a discrimination that measures the assumption of a *Verfassungsverhältnis:*

"(...) not qualified as a state of right; nor, for analogous reasons, as perpetration of unlawful actions in the context of a civil war, to the extent that they remain within the limits of the typical conduct of a conflict (e.g. serious human rights violations such as those which occurred in Ulster or in the Basque region of Spain) (…)" (Köhler, 1986)

These are crimes that concern the relationship proper to the law of nations and not the internal relationship of a State, a people, such as war of annihilation, genocide and similar crimes. No other war or civil crimes or even serious forms of racial, political, etc. discrimination which pertain to the internal law of individuals or regulate inter-state and non-universal relations. Thus the postulate of individual possibility as an intrinsic character of the single act of war, of the crime of aggression, is overcome. War is thus seen as a universal crime. A global dimension that connotes the transfer of the negative value of the sphere of the *jus gentium* which recalls not so much the jurisprudence of international courts but the doctrine relating to the violations committed during the war, lesions of the *ius in*

bello and the relevant consequences (Köhler, 1986).

The ICC has a worldwide vocation for crimes by determining the conditions relating to the *locus commissi delicti* according to art. 12, par. 2, lett. a) (Ambos, 2022a), as well as the exercise of the referral power by the Security Council of the UN (Liakopoulos, 2019c). The meaning of a *ius criminale gentium* is that prepares a permanent system of universal justice regardless of the interests and wishes of individual States or of any prerogative that has to do with one's sovereignty. The universality of international jurisdiction does not depend on the quality of State that is part of the StICC but on the indefeasible effect as a rule of law that characterizes the perpetration of universal crimes. A rule of law does not allow universal crimes, where the rule of law itself and substantive self-determination as sovereignty are committed and fail. The rationale behind it is the permanence of the ICC, as a universal criminal jurisdiction in action that cannot be questioned.

The assimilation of two completely heterogeneous phenomena remains important: the penal jurisdiction of the law of nations and the humanitarian intervention. The first represents a sort of functional introduction to the second and also assumes the characteristics of military intervention confirming the peculiar nature of coercion in this area as contiguity to the paradigm of the state of exception. The discussion of *jus ad bellum* and *jus in*

bellum (Hernàndez, 2019; Mansell, Openshaw, 2019) it can be seen as a package of rules and principles according to its own characteristics of the transition that a predefined society experiences in peacetime (Nuňez-Mietz, 2020).

The global juridicalisation of conflicts and the related need to elect some conflicts selected for their macroscopic nature, for the victims who are directly involved and/or chosen are presuppositions of global sovereignty and of those who have the power to wage war but also to found courts of justice (Shepherd, 2006). The prosecution of international crimes includes violations of human rights resulting in an element of discrepancy with the tradition of international law which recognizes state sovereignty and consequently the prohibition of interference in internal affairs. Prosecution of these crimes effectively and through an international police force where the international community has the power of intervention, *rectius* to prevent their commission and subsequent repression. An intervention not recognized by positive international law where the principle of sovereignty remains a fundamental principle in crisis situations.

In this perspective we talk about a self-dissolution of the sovereignty of the state of exception, i.e. of an involving forcing by third States with respect to the one in which the fact is committed and as happens by art. 12, par. 2, lett. a) (Ambos,

2022a) of the StICC which provides for the possibility of exercising the jurisdictional power of the ICC activated through the state referral or on the *motu proprio* initiative of the Prosecutor (Liakopoulos, 2020b). Within this spirit, the function of global punishment is presented as a prepositional concept that cannot be influenced by the concrete rules of international criminal law and it is easy to reply how difficult it is to think of a power that forbids Member States to give weight to individual cases rather than to the interest to prevent the factual impunity of war crimes and those against humanity as well as the realization of one's own interests linked to one's own international sovereignty which respects the principle of universality (Weigend, 2005)

It is a sort of anticipated declaration of relinquishment of one's sovereignty where the character of a state of exception is undoubted (Weigend, 2005). Concrete historical facts underline the acceding and ratifying States characterized by normality and presuppose within them an internal democratic, unrenistic evolution where they do not experience exceptional situations and massive violations of fundamental rights (Höffe, 1995; Kritsiotis, 2002; Findlay, 2003; Neubacher, 2005 Cuppini, 2021). Within these particular and crisis conditions they generate the state of exception in the sense that it is not a sporadic case of violations of human rights but a widespread and

rampant phenomenon where there is a return to a juridical form extraneous to the model of the rule of law. An obliteration of functional state sovereignty towards the protection and universal norms that prejudice the entire international community to a system of responsibility of States, public institutions and bodies, i.e. elements that missing from the StICC.

A hypothesis of the criminal law of the enemy

A universalism that is based on an existing system of fundamental rights legislation as the legitimization of a system incapable of protection is part of the theories of G. Jakobs (Jakobs, 1998; Jakobs, 1999). In particular the author notes and starts from:

"(...) a consideration of the so-called systemic crime (...) with respect to the prosecution of facts attributable to it-both in the context of state penal intervention (in societies that have experienced a transition from a power to another), as in that of a supposed international criminal justice-the radical objection that is raised is that it is not a question of punishing the infractions of an already existing system-which indeed precisely those behaviors allowed, covered, favored, ordered, etc.-to reconfirm the juridical nature of the existing legal system, but rather to build a completely new legal system, that is, to fight "a battle for recognition, for the attainment of a new identity (...) that of the norms and values of the new democratic system (…)" (Jakobs, 1992; Van der Vyver, 2019).

The author starts from the idea of the stabilizing function of the order in its essential foundations where the penalty operates in a way that contradicts the communicative plan and thus affirms the symbolic nature of the crime. We are talking about a monopoly of coercion where the State is the owner and pre-

exists its consequent violation. The penalty is a response to the commission of the crime, a marginalization of the legal expectations in which the offense consists and the validity of the penalty itself is confirmed: "(...) as a social system that elaborates such delusions at the expense of the offender (…)" (Jakobs, 1998).

The apparatus of coercion does not include the circle of an organized State as occurs in international justice but forms what Jacobs affirms as:

"(...) a sort of "state of nature", of a prejudicial condition (*Normlosigkeit*) in which the perpetrators of the crimes, detached from reference to a state system, assume importance not as violators of normative expectations, but simply as dangerous subjects to defend themselves from (...) lethal elements to be neutralized so that they cannot harm (...) a world law system-on a real level, not simply on paper-against those who violate humanitarian rights (…) (Jakobs, 2002).

We are faced with the consecration of the principle "*nullum crimen, nulla poena sine praevia lege*" (Dana, 2004). In fact, the social and historical contexts in which the jurisdiction of the ICC operates would be irreparably marked by the lack of recognition of the values assumed as universally valid, given that the grossest violations of human rights occur in those parts of the globe where they are not been implemented, indeed they have been contradicted and for this reason they have not offered any real criterion of normative orientation. Precisely in those areas:

"(...) the validity of human rights was radically delegitimized in general (…) the penalty cannot ignore a connotation of violence, of ablation of the means of interaction with the offender, sufficient to protect against the probability of

new infringements, because otherwise the function of reinforcing the community's loyalty to the law would be lost (…) the pain inherent in the penalty should serve to guarantee the cognitive guarantee of the validity of the law with specific regard also to the expectations of the security of society and the consolidation of one's identity embodied in the trust of the associates in the observance of the law (…) the normative perspective of the general positive preventive would be recognised, giving space to an instrumental reading of the general prevention in view of the production and strengthening of the fidelity of the associates to the law (…)" (Jakobs, 1998).

So it is understood that we are dealing with a type of international justice where the absence of an identity remains faithful producing a communication in a more evident way and in the absence of an international consensus especially when it comes to judging situations connected to justice systems of transition. The ICC, the international community, and the defendant "on the stand" are elements of an international indictment that seek to protect fundamental human rights and clearly bear the enemy's criminal law to sanction dangerous elements (Linhardt, Moreau de Bellaing, 2017), where the sanction is qualified as a penalty and assumes no other meaning than that of pure and concrete coercion, as a general rule of national or international criminal law.

Jacobs continues and believes that:

"(...) in international criminal law-it seems improper in this perspective to speak of "*Völkerstrafrecht*"-its legitimacy is built precisely on the need to neutralize dangers of precisely international significance (the crime against humanity, but even more to war crimes an unpredictable expansive capacity is inherent) or, according to a more ambitious perspective, to contribute to the diffusion of fundamental human rights on a global level. The function of international criminal law would then be that-not of stabilizing, but-of constituting a global legal order in which the recognition of the validity of human rights becomes general: an order, obviously, still to come (possibly in progress) (...) a kind of somewhat eccentric "*Feindstrafrecht*". Here it is not a

matter of guaranteeing the probability that the rules will be observed in the future, eliminating those factors-even human ones-which hinder a consolidation of this expectation on a cognitive level, but, more decidedly, of contributing to the foundation of a universal normative identity shaped on human rights to stabilize society, and confirm its configuration on a normative level, in the face of the conflict originating from the commission of the crime (…) the function of state punishment is qualified as: (...) general positive prevention, according to the eminently symbolic or communicative paradigm, modulated on the social dynamic, because it guarantees in general the "*Gestalt der Kommunikation*"; prevention, not for the effects that must be achieved with the penalty, but because it already produces the validity of the rule as a marginalization of the meaning of the fact (…) it differs from those measures oriented towards exclusion/neutralisation, which instead characterize the so-called criminal law of the enemy (…) to what the offender has done and not to what is necessary for the strengthening of the normative trust of citizens who are spectators of the punishment (…) the recovery of cognitive instances seems indisputable (…). It does not seem correct to speak of a withdrawal to the polyfunctionality of punishment, the inspiring idea of the new theoretical configuration which is the norm of "*massegebliches Dautungsmuster*" that can be reconfirmed through the contradiction in the configuration of affliction (…)" (Jakobs, 1998).

These are positions and theories that have not remained unchanged over time. The same author has changed his opinion and over the years has spoken for:

"(...) the reaction that must be adequate to effectively make the affirmation of the project contained (*Sorge für kognitive Untermauerung*) impossible in a lasting way (…), must take into account the cognitive profile of the offender's individuality (*homo phaenomenon*); therefore the penalty cannot ignore a connotation of violence, of "ablation of the means of interaction" towards the offender, sufficient to protect against the probability of new infringements, because otherwise the function of reinforcing the loyalty of the community to the right would be lost (…)" (Jakobs, 1998).

Jacobs seems to shed light on the significance of the cognitive dimension in the sense that the pain inherent in punishment serves to guarantee the cognitive validity of the law with specific regard to society's expectations and the consolidation of one's own identity which embodies the trust on the part of the

associates before the law even with a partial way of the theory of a rigorous reading and of a functional normative nature. The author distinguishes between the normative meaning of the penalty as a communicative contradiction of the denial of the existing work of the crime and the purpose of the penalty which is oriented to establish a cognitive plane of the effectiveness of the law.

According to what we have analyzed in the previous paragraphs and in relation to Jacobs' general positive preventive we can say that by now it has a rather reduced, recognitivised *rectius* character since it gives space to an instrument of the general prevention of production and the strengthening of the fidelity of the associates to the law where in the words of Feijoo Sànchez:

"(...) the importance of the element of restitution of social security in the explanation of the afflictive connotation inherent in the penalty would reveal deterrence profiles (general negative prevention), as well as neutralization (special negative prevention), which must respond to the need to produce stable fidelity to the legal system: hence the "traditional" criticism of this approach (common to all readings of the estimate instrumental), according to which it would assign illegitimately to the punishment an orientation not already to what the offender has done, but to what is necessary for the strengthening of the normative trust of citizens who are spectators of the punishment (...)" (Dencker, 1990; De Greiff, 2004; Posner, 2006; Feijoo Sànchez, 2007).

The recovery of cognitive instances seems indisputable according to the ideological opinions of Jacobs and does not seem to correlate with a polyfunctionality of punishment as in the *Vereinigungstheorie.* The nascent and inspiring ideology would be the one confirmed by the norm as "*als maßgebliches*

Deutungsmuster":

"(...) the crime cannot be interpreted only as a modification of the world in non-communicative terms (*stumm*) (...) and the punishment must reflect the dual nature of the crime by operating on the one hand as a reaffirmation of the validity of the violated law, and on the other as the production of a non-communicative pain in correspondence with the *stumme Veränderung* brought about by the offense (…) a mere symbolic response would be inadequate by not offering a sufficient guarantee for individuals and for potential future victims, but for a society that was satisfied with such a prospect it would invariably be destined to dissolve or degenerate due to the lack of a normatively structured and credible coercive apparatus (…)" (Jakobs, 1998).

A special criminal law according to Pawlik. Punishment of the *jus gentium* and devastated communities

Jacobs' pupil: M. Pawlik, following his master's thoughts on the meaning of global punishment, premised the idea that sovereignty is not the foundation of the *jus puniendi* relating to the head of State but the instrument for consolidating a community organized to ensure the individual life of citizens (Pawlik, 1994; Pawlik, 2004a; Pawlik, 2004b).

According to Pawlik:

"(...) the legitimacy of penal coercion against the persons subject to it would not reside in state sovereignty as such, but precisely in what sovereignty itself offers: the construction and conservation of a social structure which makes possible personal freedom (*Aufbau und Erhaltung einer personalir Freiheit ermöglichenden gesellschaftlichen Struktur*) (…)" (Pawlik, 2004b).

The author immediately highlights the theory of punishment and tries to cultivate punishment as legitimizing (Pawlik, 2004b), which consists:

"(...) in the foundation of a stable "infrastructure of freedom" (…) no one can be sure of his freedom towards others except by assuming this "*Zustand der Freiheitlichkeit*", which can only be maintained and implemented by an

organized society, by institutions (…) the prerogative to guarantee this "*Daseinordnung der Freiheit*" is not exclusive to the State. Even a supranational community can do it, but to the extent that it is able to sufficiently develop its own institutions in the role of subsidiary or complementary guarantor; the decisive factor is whether this community is suitable for consolidating its regulatory prerogatives in a legal system that is respected in normality and therefore effectivity (…) international criminal law does not fit into this framework of the state penalty: lacking on a global level an institutional structure appointed to fulfill the conditions of freedom, this model of punitive intervention will substantially present completely heterogeneous characteristics with respect to the logic of the "*ausgleichende Gerechtigkeit*" (Keller, 2002; Keller, 2006) and the function of legitimate punishment will be deduced from different principles than those that govern punishment in the context of state coercion (...) of overall perverted legal systems, which systematically disregard the fundamental freedom rights to certain groups of victims (genocide) (…) hypotheses that are subject, today even through the complicated mechanism of the Rome Statute, to the *Weltrechtsprinzip* (…)" (Pawlik, 2004b).

According to Pawlik, the result and the aim of the penal sanction of the people recalls the preventive vocation of the punishment as a paradigm of coercive intervention, where it tries to satisfy the need of the victim for a commitment towards himself; excludes compromised criminals; demonstrates and tries to affirm the importance of a standard of human rights and its own capacity at the level of universal justice. It is a logical descriptive ideology with regulatory characteristics of the international penal system that disregards the desirable functions that follow the extension of the application of the penal law of a national nature over state borders and to certain categories of crimes such as, for example, political ones. An ideology inspired by the principle of universality of those values of a legal nature, protected by that of defense connected to the prerogatives of

sovereignty (Pawlik, 2004a).

The sanction is not the same as the penalty, but is presented as a preventive measure in the context of civil reconstruction. It is a special criminal law (Pawlik, 2004a) as the basis of a model that encounters certain limitations, a partial weakening of the standards of guarantee of the rule of law. Both the opinions of Jakobs and Pawlik consider how it is understood that sanctions in the international context take on the meaning and relevance of an existing order which offers a contribution to the rebuilding of society which concerns the rooting and respect of human rights (Pawlik, 2004a).

In our opinion, Pawlik did not agree with the so-called paternalism of the indictment which always and absolutely requires the punishment of the offender and without providing for any form of amnesty (Robinson, 2003) even against the will of the countries concerned. The process of rebuilding the identity of a society devastates. The achievement of a minimum standard of civilization must require an overcoming of the very complex past as a punishment for some perpetrators (Pawlik, 2004b). We note a culture of restorative justice and not of absolutism of punishment as a paradigm of Feindstrafrecht (Morguet, 2009; Polaino Orts, 2011), *in antipoda* of a form that respects these forms of conflict management.

***Feindstrafrecht:* Coercion, rule of law and, criminal law of the enemy without an enemy**

The citizen and his property are connected and limited in the strength of sovereignty (Pawlik, 2004). Where the organizational structure of an institutional type for the conditions of freedom of its members is missing, penal coercion will be heterogeneous to the logic of the State one, as the only historical realization. Coercion, an exercise of brutal force, is carried out by a non-sovereign authority as a function of protection from dangers where the criminal legal system contributes to the production of a better future system (Derrida, 1994). The *Feindstrafrecht* as a "polemical" place of the daily modernity of criminal juridical thinking is found in the models of exclusionary punishments based on the logic of incapacitating the offender and/or on pure deterrence which according to Anglo-Saxon law is oriented towards the delegitimization of subjects as citizens who consider liberal polities are incompatible (Goldman, 1982; Duff, 2001; Meyer, 2017). And what relationship exists with international criminal law?

It is a clearly descriptive position where the assumption remains inalienable of responsibility and the pre-existence of reciprocal liberties or rather of the juridical community integrate the reciprocal and connected liberties in a system of unsurpassable tradition. It is that enemy as a defendant before an ICC who

seeks a certain conviction and not the concrete ascertainment of the facts based on the evidentiary findings confirming the theory of the criminal law of the enemy, elements to be neutralized, annihilated or excluded.

Work of the Prosecutor is to find elements exculpatory to the defendant according to art. 54, par. 1, lett. a) (Liakopoulos, 2019a) affirming the principle of presumption and innocence according to art. 66, par. 1 (Ambos, 2022a); the prohibition of reversal of the burden of proof and on the prosecution according to art. 66, par. 2 (Ambos, 2022a), the prohibition of conviction in the event that guilt has not been established and beyond any reasonable doubt according to art. 66, par. 3 (Ambos, 2022a). The founding model is the accusatory one and chosen on the same level as all the parties to the process (Gless, 2021).

So far we have seen that Köhler, Jakobs and Pawlik have coordinated a balance in terms of legitimacy, jurisdictional coercion of the humanitarian war intervention (Atadjanov, 2019; Eudes, Ryfman, Szurek, 2019). A transformation where the conflict situation is the subject of judicial proceedings and takes place when the offender is in one's own hands. The *Normlosigkeit*, i.e. the anomy of the pre-juridical state, is encountered on a universal level in a situation of a legal order guaranteeing the conditions of existence and of a community that germinates the model of human rights which respects the

penal culture as respect for fundamental human rights and as Jakobs has qualified as excessive freedom and at the same time as excessive struggle which culminates the hegemonic affirmation of that model which supports not who prevails in a war situation but who establishes a certain norm from that moment on.

The *nomos* of international criminal law attaches to the state of exception, a dimension that brings it closer to criminal law. An excess of penal law that compensates as an excess of void of law, certainly an oxymoron but assessable for the identification of a situation of horror of atrocities, i.e. object of judgment. A compensation not of a classic retributive type, but a normative identity in the path of consolidation, as a reflection of the universal crimes that concern all of humanity. Identity oriented to exclude sovereignty according to Köhler; the identification of a criminal law identity which excludes the offender like Jakobs and Pawlik apparently opposed to a humanity where the universal concept is the object of injury, where the state of exception causes the criminal subject and the rule of law to decay, the void of law produces the exception of law (Pawlik, 2004b). The state of exception, such as:

"(…) a not exactly jurisdictional "decision" is left to a non-sovereign Court which operates without pre-established limits of space and time. Nexus between the state of exception as a material source of legitimation-the void of law in the face of an excess of prevarication-and the prospect of building a globally widespread identity (not necessarily universal, but as extensive as possible) (...) (Schmitt, 1974) of implementation of human rights: through the

mediation of the express and ratified consent of the States Parties to the "global penalty" (Oberreuter, 2008) (and regardless of those involved without having accepted) the function of reaffirming the seriousness would then be assigned of the commitment to a justice of this type, therefore to the future construction of something that is not yet in force. In addition to the desire to snatch from oblivion-by judicial means-the drama of historical facts to make them rise to the emblem of atrocities (…)" (Schmitt, 1922).

Within this context, international criminal law is interpreted as an identity tool for building some expectations that are not rooted from a normative point of view (Abi-Saab, Keith, Marleau, Marquet, 2019). At the same time, the intervention intends the need for a confrontation with crimes that are included in art. 5 StICC (Liakopoulos, 2019a) which places modern international criminal law before the option of a restorative justice which assumes the task of re-founding today's communities that such crimes have been torn apart. The growing culture of this type of international criminal law has found many supporters in recent years and has certainly paved the way for the evolution of the international criminal law.

Necessitas habet legem universalem

The StICC has also been based on the state of exception, interpreted as a global humanitarian criminal law (Buirette, 2019), as a ratio of international criminal justice (Maison, 2017) where it is understood in law implemented in its concrete forms, not so much conflicting but in the classical sense. The exception has recovered through the jurisprudence of the international criminal law a central place in the discussion relating to acts of

terrorism with the beginning and culmination of what happened in the United States on 11 September. The now necessary military intervention and the state of exception as a sort of *rechtfreier Raum* taking into consideration the parameters of extraordinary responsibility connected to the safeguarding of the State and its institutions in the face of any emergency (Murray, 2008). The state of exception now becomes the object of judgment of a justice that ignores the framework and limits of statehood, translating the devastating violations of human rights as a *necessitas habet legem universalam*, a necessity that is based on the reaffirmation of punishment as a measure of protection and oppression against gross violations and the universal protection of human rights in emergency situations.

The state of exception and its anomic nature demands the juridicalisation of the validity of fundamental rights on a global scale and sanctions violations. It comes back as a brilliant demonstration via the StICC against all atrocities and the road to impunity remains just a thing of the past. Compared to universal criminal law where the state of exception does not appear as a one-off but in a permanent manner due to its recurrence and ubiquity (Babaian, 2019).

Exceptional humanitarian law

The universality of the judgment, but also the relative penalties

of every universal penal system are not based so much on the StICC but on the seriousness of the crimes envisaged, in the state of exception which is now an interest for the entire international community and which justifies a humanitarian penal intervention.

Violence against women and children, confirmed rapes and others not as part of a system of organized ethnic cleansing tolerated by state apparatuses fall under the model of jurisdiction, which was designed by the StICC as heinous crimes committed by sex offenders. The conduct in this case does not concern the criminality but the context in which it occurs. A context that sometimes makes anomalous behaviors normal due to its repetition and the massiveness by organized groups within situations of indicted facts where the same victims are unavoidable in the face of different unrepeatable and historical-social circumstances (Olàsolo, Kiss, 2010). In such cases, international criminal law is now thought of as a model of systemic crime, characterized by conformity to the system of criminal behavior in a massive manner, as well as within societies in transition that experience abnormal situations. The concept of humanitarian criminal law concerns that humanitarian intervention of a jurisdictional and non-military type where it Judges situations of exception that involve and mark areas in which human rights are excluded at the level of

social identity when the system appears as a government that guarantees the protection of human rights, control the information disseminated (Neubacher, 2005) and stop the subjects who violate them.

In various exceptional situations, the commission of criminal acts can be motivated by a situation of systemic necessity, such as a sort of undeclared state of war where the elimination of the other imposes various and similar prevention needs (Jahn, 2004).

The qualification of a universal crime and the relative activation of the special international jurisdiction depends on the state of exception as a special device that seeks to disrupt the structure of state sovereignties by imposing the jurisdiction of the StICC also on non-ratified States and on the principle of *pacta sunt servanda* that characterizes the *jus gentium* (Böckenförde, 1978)[38]. International crimes, when they strike the international community in its integrity, undermine the armor of state sovereignty as a model on horseback that delegitimizes, resizes

[38]According to the author: "(...) recourse to the criminal law of the state of necessity is undue, as it would be a general authorization to overcome situations of necessity in the face of which any constitutional and legal form of authorization and limitation of the authorization would end up assuming a provisional value (...) the stabilization and conservation of the normal order presupposes the recognition of the state of exception, the measures necessary for the maintenance of the essential conditions of civil coexistence must be distinguished in terms of validity from those which instead concern the juridical conditions guaranteeing the rule of law in the sense that one cannot be commensurate with the other (…)".

the sovereignty of States and jeopardizes the vision of the world in which it has been affirming itself for centuries. The state of exception entails a correlative loss of sovereignty and legitimate forms of intrusive humanitarian intervention. Crimes against humanity (Morales, 2020) emerge as a global state of exception (Williams, 1999) and justify the suspension of guarantees guaranteed by state sovereignty, the deactivation of the territorial limits of the *ius puniendi* (Bock, 2007).

This model with the principle of individual responsibility expressed through art. 25 StICC (Stephens, 2011; Olasolo, 2016; Azzolini, Biancaz, 2018; Liakopoulos, 2019b) responds exclusively to the logic underlying the system which seems to indicate the reason for building the system which does not lie in the single fact, in its own gravity, in connection with other facts, in the social alarm that it produces, in the reference context that inserts and expresses its potential, where the defendant presents himself as: "the incarnation of a regime, the symbol of all the criminals of the regime (…)" (Böckenförde, 1991).

Within this spirit it is necessary:

> "(...) the ambition to exploit justice in a more direct way, if necessary also by emancipating oneself from the law (...) from its guarantees, from its rituals, even from its formalisms, perceived as a burden useless and a sneaky tool to cover up real universal values (…) excess as a correlate of the exception characterizes both reconstructive justice and, on a fundamentally not too dissimilar level, humanitarian intervention in violation of sovereignty (…)" (Liakopoulos, 2019b).

The nature of judgment on sovereign power passes through its apparatus to be put on trial in international criminal justice

(Gless, 2021). The state of exception presents itself in situations of: "law less void", in which the crimes:

"(...) cannot be punished or pardoned because they are not otherwise understandable outside of that situation, the meaning of international criminal justice then it seems to consist in the re-appropriation of that space by the law (…)"(Hoyer, 1996; Garapon, 2002).

We are talking about an international forum that "knows" the crimes committed in a state of exception, where the existence of the ICC actually denies that there are "juridically enfranchised states of exception (…)" (Hoyer, 2004). It is not a global court with unlimited universal jurisdiction but an emergency court (*Notfallgerichtshof*) (Hoyer, 2004). Because it intervenes only when the state of exception prevents the activities of national jurisdictions with the aim of re-establishing the rule of law in an other-directed way after the upheavals of a conflict, favors the reconstruction of an order that destroys dictatorships, resumes legality, the functioning of institutions that guarantee the law as we have already seen from the past with the birth of the Nuremberg tribunal (Beauvoir, 1963).

Complementarity and state of exception

The principle of complementarity according to art. 17 StICC (Heller, 2006; Mègret, 2011; Stahn, Zeidy, 2011; Heller, 2012; Bitti, 2016; Ambos, 2022a) depends on the protection implied by the state of exception[39]. The objective of the principle of

[39]ICC, Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Case No. ICC-01/09-02/11-274), ICC Appeals Chamber,

complementarity is configured as a principle comparable to the institutional mechanism which implies the existence of an obligation of an indirect nature adapted to the provisions of substantive law according to the StICC. This principle has the characteristics of a process of harmonization between national regulations and the standards established by the StICC itself.

This principle is interpreted in accordance with the logic of a system in which global humanitarian criminal law functions as the law of the exception characterizing the normative abnormality in which mass crime is also legitimized by the same system.

The activation of the principle of complementarity appears as a logical consequence of the fact that one cannot speak of a crime

Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011(Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Case No. ICC-01/09-02/11-274), ICC Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011(Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Case No. ICC- 01/09-02/11-274), ICC Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 In Prosecutor v. Bemba, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, para. 239: "(...) the Trial Chamber considered whether the same case had been investigated by the Central African Republic ("CAR") which has jurisdiction over the alleged crimes and CAR has decided not to prosecute, rendering the case inadmissible. The Trial Chamber stated in paragraph 242 that neither of the "decisions by the national courts and the State (viz. to refer the case to the ICC) were decisions "not to prosecute". They were, instead, decisions closing the proceedings in the CAR-there was an order for severance that approximately coincided with the referral to the ICC (they were two days apart). It follows that the first element of Article 17(1)(b) is not met: in the sense described by the Appeals Chamber, there has not been a decision not to prosecute the accused. To the contrary, the CAR seeks his prosecution before the ICC. This decision was upheld by the Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", 19 October 2010, paras. 1, 74–75 (…)".

that conforms to the system but of a more serious crime which remains within the context of national jurisdiction. It is activated when an abnormal symptomatology occurs, i.e. when the lack of prosecution by the national jurisdiction is precisely the clue towards a criminal system in itself. This is how the state of exception and international criminal jurisdiction are triggered (Tsilonis, 2019).

The ICC also intervenes in the case of a process concluded at the national level where the proceeding aims to remove the person concerned from his or her criminal responsibility (Babaian, 2019) or was not conducted independently and impartially with respect to the guarantees provided by international law but in an incompatible way and certainly to guarantee the interest of justice according to art. 20, par. 3, letter. a) and b) (Klamberg, 2017; Ambos, 2022a). The ICC has an effective primacy which attributes the so-called competence. The need for a global jurisdiction prosecutes crimes against human rights and exists to the extent that it is assumed that the national ones do not offer an effective guarantee of activation and in this sense a similar need is lost where the competence of the ICC is oriented towards a *vulnus* to the traditional principle of *jus gentium* and non-interference in the internal affairs of individual States. This type of lack of guarantee identifies the incompatibility between the condition of the proceeding at the

national level of objective justice, that is the state of exception (Sadat, 2002).

Finally, we can say that the practice of the ICC has shown us possible connections between the related issues that have to do with the definition of the notion of "same conduct"[40] as a component of the term "case". Within this circle, complementarity, as a flexible regulatory mechanism between the substantive law of the Member States and the StICC, is presented as a double principle, i.e. double complementarity which takes note of the fight against impunity for serious international crimes. Crimes which also allows States a certain margin of discretion in the application of international norms by creating a uniform identity to the applicable norms by developing the idea that the principle of complementarity becomes a dynamic factor of harmonization, of penal unification at a universal level (El Zeidy, 2008).

[40]ICC, Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali (Case No. ICC-01/09-02/11-96), (Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Case No. ICC-01/11-01/11-276-Red2), ICC Pre-Trial Chamber I, Prosecution's Response to "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", 12 February 2013, paras. 28-29. Prosecutor v. Said Al-Islam Gaddafi and Abdullah Al-Senussi (Case No. ICC-01/11-01/11-466-Red), ICC Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, p. 34.

“Subsidiary” penalty and jurisdiction of the ICC

Crimes against humanity (Morales, 2020) take account of their own nature, the legitimization of an international criminal justice as an object of knowledge of international courts and an affirmation of the universal protection of human rights. The ICC must apply the principles that make up the architecture of the rule of law understood in terms of the protection of fundamental human rights, marked by the state of exception and in comparison with these principles. This is quite a vicious circle (Sadat, 2002) and the ambition remains that the purpose of punishment in the jurisdiction of the ICC should be to foster the process of overcoming the state of exception and to contribute to the rule of law through the related documentation the condemnation of the main perpetrators who played a central role in their perpetration, in view of the victims' expectations of justice[41].

The ICC presents itself as an aim that goes beyond meaning and seeks to reassemble a legitimate power, allowing for governance that respects human rights and the expectations of the international context. In this case, international criminal law also responds to individual justice as a further facet of the state of

[41]Prosecutor v. Kayishema and Ruzindana, No.: ICTR-95-1-T, 21 May 1999, para. 2; Prosecutor v. Akayesu, No.: ICTR-96-4-T, 2 October 1998, para. 19. Prosecutor v. Furundžija, No.: IT-95-17/1-T, Judgement, 10 December 1998, par. 288. (Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Case No. ICC-01/11-01/11-466-Red), ICC Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, para. 86).

exception where the power of non-impunity for crimes and the punishability of individuals is preserved. The exception cannot be governed, inspired by reasons of political realism but a universal management of the *Ausnahmezustand* which:

"(...) requires the celebration of some exemplary trials (and the condemnation of some scapegoats), real "media ceremonies" (…)" (Prittwitz, 2003).

The focus of this type of penal intervention on the state of exception dates back to the reconstructive criminal justice where criminal law is based on the principles that characterize it, limited to something seriously illicit, and on the basis of a general consensus for something to be considered illicit. Criminal law is assigned the function of a general consensus based on identity that does not contradict its own nature. This form of justice is presented as:

"(...) the only valid presupposition of such justice is a *debellatio*, followed by the occupation by the victor of the territory of the eradicated State (…)" (Minow, 1998).

A war victory is (Schabas, 2010) available to try those responsible for the crimes so that they are persecuted and handed over. The now objective international criminal justice is possible to operate within a context where its supporters are the real winners, that is the maximum expression of legal civilization and renewed collective consciousness different from an achieved justice on the triumphant side (Saada, 2011). This is one of the limitations of international criminal law. An objective justice that brings those responsible "to the bars of the Hague" by prejudging those who have the power to do so and demand a

condemnation of an impartial and aseptic judgment, understood as judicial and criminal justice.

The "answer" of reconstructive justice

An answer to the exception is restorative justice of an analogical but not reciprocist nature (Cohen, 2020; Gil Gandìa, 2020). It is a symbolic response of a repressive type where justice is done to whoever is found involved either as a victim or as a criminal in extra-ordinary situations in their complexity through criminal proceedings and convictions.

The exceptionality presents itself as an object of judgment where normal rules are suspended. The destructive effects on the connective tissue of the communities are the scene of historical extinction that makes the adoption of healing operations for individuals and societies reasonable in the cultural context of reference.

Referral to the state of exception appears more consistent with restorative justice solutions (Haque, 2013). The need for appropriate intervention means resolving the very codes it establishes, i.e. human rights through an understanding in which these have been violated. The protagonism of the victims foresees the possibility of participation in the process of truth and responsibility which favors local mediation and reconciliation. The affliction of the penalty is understood in

atrocities and takes on the value of an exceptional suspension of the traditional mechanisms of criminal reproach to promote truth and reconciliation.

The assumption of the state of exception as a type of dimension of the crime against humanity constitutes the conversion of global international criminal justice, humanitarian to restorative justice protocols, as the basis and work of the ICC in this perspective. In the international criminal process (Gless, 2021) a functional profile remains that of bridging the distance with respect to the object of cognition which attenuates the sensitivity treated as "a fiction" of the penalty in the international arena. Punishment as a sense of reality, of the tragic truthfulness of the atrocities committed which does not diminish and does not lose its importance just because it takes place in a distant context, reduced as a phenomenon of our times to pertain to a state of exception. In this perspective there is a global dimension with a truthful function where the final penalty presents itself as an absolute protagonist of international criminal justice (Maison, 2017).

Institutionalization of restorative justice through a future reform of the principle of complementarity and/or of the StICC

We insist that the state of exception (Childers, 2014; Sarkin, 2017) presents itself as an obstacle factor (Clark, 2005) to judging situations where one's own functioning is impossible. A state of exception which requires strong choices of curtailment of the States concerned and measured in the substantial net alternative. The solution of restorative justice (Altunjan, 2021) is possible whenever the outdated transition of the state of exception is concluded, i.e. “imposed from above” through the model of complementarity in the sense that it delegitimizes those who hold sovereign power and seek to continue masking the truth by distancing the ICC from the truth, that is the “criminal elites” continue to undermine international justice and the continued commission of violations (Hafner, King, 2007). It is the time it takes a concrete activity of criminal jurisdiction in favor of conflict settlement alternatives and not presenting themselves as we saw during the Nuremberg as “judgments on the exception” (Findlay, Henham, 2005; Findlay, Henham, 2010; Cuppini, 2021).

The problem of the lack of coercive instruments suitable for making the determinations of the ICC effective, i.e. summons for witnesses, arrests, on-site investigations, participation of victims, etc., remains unresolved despite the analogy with humanitarian interventions. We need a more efficient role of the Security Council of the UN as a logistical support point and not

just decision-making and military. Over the years, the hegemony of the SC has lost its "sovereignty" and does not fill any gaps presentable *in tempis* which are often preferable to the imposition of an obligation of cooperation between States and institutions, thus favoring the transition towards reconciliation after a phase of state of exception by fulfilling obligations that can strongly jeopardize similar expectations (Findlay, Henham, 2010).

A "romantic" path also remains open for those who see the ICC as a reconciliatory/reparative model and as a means to resolve, avoid conflicts that result in the commission of international crimes and those against humanity (Findlay, Henham, 2010). A conciliatory justice on a local or global basis obviously with certain limits and also ready to fail (Morris, 2000)

The penalty assumes a heterogeneous purpose with respect to various legal traditions since it respects the fundamental principles of international law and above all of the rule of law. Restorative justice is certainly suitable for fundamental purposes but it is necessary to rethink the extrajudicial system, decentralized and placed on places of conflict sensitizing to the traditions of various legal systems oriented to deconstructive conflicts, bringing the parties in dispute closer through their own participation of the victims (Saferling, 2021) and reconstructing the truth of the events, healing the social fabric by sanctioning

and rewriting the principle of complementarity as well as bringing changes to the StICC in the near future as an evolution of the international criminal justice.

Concluding remarks

As we have understood so far, we can come to the conclusion that international criminal law is the product of a continuous work of evolution, universalisation, harmonization and standardization which creates through jurisprudence a corpus of comprehensive law and high standards against the continuous fight against impunity and international crimes.

Punishment as an element of this impunity responds and establishes a universal vocation for the protection of goods and values that are part and respond with a way of "certainty, stability and predictability" of the criminal sphere[42]. Of course, penalties in the field of international criminal law and through the StICC are not characterized by a fragmentation, heterogeneity that is encountered in various legal systems and above all at the national level, as well as in international humanitarian law and human rights. The pluralistic ambition of punishment is found operating in the ambition of creating a normative system of a growing global dimension, exercised by

[42]ICTY Appeals Chamber, Prosecutor v. Aleksovski, Judgment, 24 March 2000, IT-95-14/1-A, par. 101.

ad hoc tribunals and the ICC by multiplying the auxiliary inconsistency of public international law as an evolving law which puts the individual in the centre, positioning an international criminal law in the same position with the international public law. The traditional structures of consent-based decision making and inter-state cooperation are characteristic elements of the formation and application of international criminal law (Liakopoulos, 2019b).

The penalties established by international criminal justice have distanced us from the variable geometries of the past where international crimes in some ways are now crimes that are found in the light that characterize the course of international criminal law as the main “cross” against the darkness, the past, the impunity of the monsters paving the way for a humanity that continues and will continue to require a total identity, uniform with the rules applicable to universality (Stephen, 2012).

Concrete punishments and juridical, normative pluralism do not go together given that pluralism mostly excludes universality. Let us not forget that international criminal law builds through the punitive system and not only a supranational system that provides the contribution of a progressive rapprochement, harmonization of national criminal justice systems. Penalties together with harmonization are topics of amazement and debate. In our opinion, harmonization of international criminal

law through penalties means homogenization which implies an international process towards a progressive approach of national legal systems, of the international system on the basis of principles and values that are universally recognized. The penalties have paved the way for the harmonization process as a perfect identity between compatible internal and international standards which guarantee on the one hand a certain margin of discretion to the States and on the other hand imply the acceptance of the fact that every Member State of the ICC whether or not it can enjoy a certain margin useful for guaranteeing in a flexible way the limits and divergences that make up what we call the protection of human rights as a parameter of legitimacy suitable for guiding the process also of adapting internal legal systems to international law.

The penalties now show that the period of tolerance is over. Not because the different legal traditions are now respected but also because the intrinsic diversity envisaged above all by the StICC suggests a growing fragmentation and lack of homogeneity in the application of the evolutionary standards of the international criminal law. The codification of the international criminal law has now begun and is constantly evolving under the aspect and substantial procedural nature of the provisions that now conform to a customary international law, a certain space that clarifies the scope of a certain norm, that norm, that statute which are also

part of the penalties of international criminal law.

Too much or too little (depending on your point of view)? It is a question which, in the perspective of a broader "system" intervention (already begun and we expect to be evolutionary in the near future) could find answers more up to expectations at a theoretical-scientific level and on the level of "government-institutional" in the judiciary at a *super partes* level of the phenomena of punishability. Penalties, in the awareness of a certain "dynamism" of evaluations in practice through jurisprudence where a sort of rigorous "closure" and incommunicability between the multiple levels of "selection" of the sphere of international penal intervention is now being cultivated. We look forward to the future as a fight against impunity.

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